No. 21307, No. 21307A, No. 21307B, No. 21307C

United States Court of Appeals

FOR THE NINTH CIRCUIT

FLUOR CORPORATION, LTD., *et al.*,
UNION TANK CAR COMPANY,
WARD INDUSTRIES CORPORATION,

Appellants,
Cross-appellees,

—v.—

U. S. A., EX REL MOSHER STEEL COMPANY,

Appellee,
Cross-appellants.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ARIZONA

OPENING BRIEF OF APPELLANT, WARD INDUSTRIES CORPORATION

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The defendant-appellant, Ward Industries Corporation ("Ward"), now known as Dragor Shipping Corporation, appeals (R. 1351):[1]

(1) From a final judgment for the sum of $268,882.92, together with interest and costs, made and entered against it after trial by the United States District Court for the

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[1] The Record on Appeal herein includes, as volume 8, the reporter's transcript of the trial testimony. All page references in this brief to the Record on Appeal will be prefixed by the letter R; all page references to the reporter's transcript will be prefixed by the letters RT, the lettering employed by the District Court in its Findings of Fact.

District of Arizona, Tucson Division, in favor of the plaintiff Mosher Steel Company ("Mosher"); and

(2) From the failure of the District Court to grant Ward's motion to dismiss Mosher's complaint against it upon the close of the plaintiff's case, as well as its motion to dismiss Mosher's complaint against it upon the close of the entire case.

The District Court granted a judgment against Ward in addition to the judgment which it entered in favor of Mosher against the defendants Union Tank Car Company (Union); Fluor Corporation, Ltd. (Fluor); and the sureties upon a Miller Act payment bond filed by Fluor (R. 1241). In its amended complaint, Mosher alleged, in brief, that it had fabricated and delivered to the defendant Union, pursuant to a verbal and written contract between Mosher and Union, certain steel owned by Union for Union's use in the erection of certain levels and structures at the Missile Launch Facilities near the Davis-Monthan Air Base at Tucson, Arizona (the Tucson project) and the Vandenberg Air Force Base at Vandenberg, California (the Vandenberg project).

The total amount of Union's contractual obligation to Mosher for Mosher's fabrication and delivery of Union's steel to Union for erection by Union upon the Tucson project was the sum of $298,336.58; the total amount of its contractual obligation to Mosher for Mosher's fabrication and delivery of Union's steel to Union for erection by Union upon the Vandenberg project was the sum of $22,716.96; and the balance remaining unpaid, after credits, to wit, the sum of $268,882.92 was the amount for which Mosher was granted a judgment against Union by the District Court in this action.

The judgment against Ward was granted upon Mosher's claim that Ward "became *an additional obligor*" for the amount of Union's indebtedness to Mosher. (Amend. Compl., Count II, par. 3, R. 268.)

Jurisdictional Statement

Jurisdiction of the within appeal exists under and by virtue of Sections 1291 and 2107, Judicial Code, Title 28, U.S.C.

Statement of the Case

The plaintiff Mosher is a steel fabrication firm located in Texas with its principal offices in Dallas and Houston. It brought this action to recover the agreed value of the services which it rendered and the materials which it furnished to Union in the fabrication of certain steel owned by Union, under a written and oral contract with Union, for erection by Union at the Tucson project, as well as for a smaller project at Vandenberg, California.

The principal or prime contract for the Tucson project was issued to Fluor by the United States Army Corps of Engineers, Ballistic Missile Construction Office. Fluor had in turn subcontracted a substantial portion of the work required by the prime contract to the Graver Tank & Mfg. Company ("Graver"), a division of Union.[2] Under its subcontract, Union was required to purchase, fabricate and erect the steel required for certain levels and structures upon the project. Thereafter, Union subcontracted a por-

[2] In the Court below, the names "Union" and "Graver" are used interchangeably to designate the defendant Union Tank Car Company. The same useage of those names, interchangeably, to designate the defendant Union Tank Car Company will be utilized in this brief.

tion of its work, including the steel fabrication but not the steel erection, to a joint venture consisting of Idaho Maryland Industries, Inc. ("IMI") and Ward. Subsequently, Union removed the steel fabrication work from the joint venture subcontract and entered into an oral and written contract with Mosher for Mosher's fabrication of the steel purchased by Union for the Tucson project and the smaller project at Vandenberg, California, at which Union was likewise a subcontractor.

The District Court held, after trial, that Union was *directly, primarily and individually responsible under its oral and written contracts with Mosher* for the payment to Mosher of the value of the services performed and the materials furnished by Mosher to Union upon both the Tucson and Vandenberg projects. The Court thereupon directed a judgment against Union for the balance due and owing from Union to Mosher in the sum of $268,882.92. Fluor, as the prime contractor upon the Tucson project and the sureties upon Fluor's Miller Act bond (Jt. Exh.[3] 49), were held liable for the sum of $246,165.95, since neither Fluor nor its sureties were involved in the Vandenberg project.

Mosher's own testimony upon the trial conclusively destroyed its contention that Ward "became an *additional* obligor to plaintiff" for the monies due and owing to it from Union. Each of the four individuals whom Mosher called to the witness stand—Paul E. Mitchell (Mitchell), Mosher's Senior Contracting Engineer; R. L. Burton (Burton), Mosher's Vice-President; Russell L. Moore (Moore), Mosher's Treasurer and General Credit Manager; and Sam A. Wilson, formerly General Manager

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[3] The letters "Jt. Exh." refer to the Joint Exhibits introduced in evidence upon the trial.

of the Denver Steel and Iron Division of Idaho-Maryland Industries Inc. (IMI)—testified unequivocally that it was Union, *and Union alone,* which employed Mosher to perform the fabrication of steel owned by Union; that Mosher relied *entirely and exclusively* upon the credit of Union; that it looked *solely and only* to Union for payment; that it would not, *and did not,* at any time, extend any credit whatsoever to IMI, Ward or the joint venture of IMI-Ward; and that from the commencement of its work until its completion, *it had never looked to or relied upon IMI, Ward or IMI-Ward for the payment of any of the services or materials* for which this action was brought.

The testimony of Mosher's own witnesses, and every writing produced by it upon the trial, so completely demolished its claim against Ward that it is impossible to comprehend the rationale of the District Court's failure to grant Ward's motions for a dismissal at the close of the plaintiff's case and at the close of the entire case; or the District Court's direction, sixteen months after the conclusion of the trial, of a judgment against Ward, in addition to the judgment entered against Union.

The Issues Presented by This Appeal

The sole issue upon this appeal is whether or not Ward can be held liable to Mosher for the labor and materials performed and furnished to Union by Mosher, pursuant to its express oral and written contract with Union, upon steel owned by Union where, concededly, Mosher was never employed by Ward; its services were never performed for Ward; its materials were never furnished to Ward; Mosher adamantly rejected the credit of Ward; and Mosher concededly never looked to or relied upon Ward for payment.

To apprehend the total absence of any factual or legal basis for the judgment entered by the District Court against Ward in this action, we turn to a review of the proceedings and proofs before the Court below.

The Causes of Action Alleged Against Union and Ward in Mosher's Amended Complaint

The amended complaint of the plaintiff herein (R. 268) sets forth seven counts, all of them, with the exception of Count III, being causes of action against Union. Only two of the counts, Counts II and III, are alleged against Ward.

1. Mosher's Causes of Action Against Union

In its first cause of action against Union, Fluor and the sureties, Mosher sues upon the Miller Act payment bond filed by Fluor. It is alleged that Mosher furnished, fabricated and delivered certain steel incorporated in the Tucson project *"at the special instance and request of Union Tank Car Company . . ."*; that Union failed to pay the agreed price and reasonable value thereof; and that Union, Fluor and the sureties are liable for said amount. (R. 268-270) In its remaining counts, Mosher alleges that it furnished, fabricated and delivered certain steel to the Tucson and Vandenberg projects *"at the special instance and request"* of Union, and that Union failed and refused to pay the agreed price and reasonable value thereof, amounting to the total sum of $321,053.54.

2. Mosher's Causes of Action Against Ward

The amended complaint of the plaintiff sets forth two causes of action, Counts II and III, against Ward.

In Count II, the plaintiff alleges that certain steel was furnished, fabricated and delivered by the plaintiff "at the

special instance and request of Union Tank Car Company". (R. 271-273). It is then alleged that, *in addition,* "the *said Joint Venture* and Ward Industries Corporation, Defendant, *as joint venturer,* agreed to pay Plaintiff for furnishing, fabricating and delivery of said materials the agreed price and reasonable value of $298,336.58 * * *" and that, "In so agreeing, Ward Industries Corporation, Defendant, became an *additional* obligor to Plaintiff for said sum". (R. 272).

In Count III, the plaintiff alleges that Ward and IMI were *"joint adventurers* pursuant to a written contract"; that "on or about November 3, 1961, the *joint venture* comprised of Idaho Maryland Industries, Inc., and Ward Industries Corporation *agreed to pay Plaintiff* for furnishing, fabricating and delivery of materials of the agreed price and reasonable value of $298,336.58" for the Tucson project and $22,716.96 for the Vandenberg project; that the defendants, Ward Industries Corporation and Idaho Maryland Industries, Inc. have failed and refused to pay the plaintiff the sum of $321,053.54"; that "Idaho Maryland Industries, Inc. has been reorganized and a plan confirmed under Chapter XI of the Bankruptcy Act"; and that "defendant Ward Industries Corporation is liable unto the plaintiff, Mosher Steel Company, for the aforesaid sum * * *" (R. 273-274).

Ward's Answer

As appears from the denials contained in its answer (R. 29-30; 327-330), Ward has emphatically denied, from the very inception of this action, that Ward or the joint venture had ever incurred any liability to the plaintiff, or that the plaintiff had ever accepted, or relied upon, the credit of the joint venture, or either of its members, or had *ever looked to the joint venture, or either of its*

members, for payment. In addition thereto, Ward alleged in its fourth affirmative defense that *"if"* the plaintiff had delivered any steel or other materials to IMI, such delivery was made *for the individual account and upon the individual credit of IMI and not for the account or credit of Ward nor "as an agent or member of a partnership or a joint venture."* (R29; 239)

Mosher's Proofs Upon the Trial

Mosher's causes of action against Ward were predicated solely and exclusively upon the testimony of the four witnesses whom it called to the stand: Mitchell, its Senior Contracting Engineer; Burton, its Vice-President; Moore, its Treasurer and General Credit Manager; and Wilson, formerly General Manager of the Denver Steel and Iron Division (Denver) of IMI.

By their unqualified admissions, these witnesses whom Mosher itself had called irrevocably destroyed its claim against Ward. Their testimony conclusively established:

Firstly, that, in this transaction, Mosher relied entirely and exclusively upon the credit of Union; contracted with no one but Union; and looked solely and only to Union for payment; and

Secondly, from the commencement of its performance until the completion thereof, it had refused to accept, and continuously rejected, the credit of Ward, IMI or the joint venture, and had never looked to Ward, IMI or the joint venture for payment. It was not until Mosher consulted its attorneys, after the bankruptcy of IMI, that it devised the theory, as an obvious afterthought, of "an additional obligor" which it invoked against Ward in this lawsuit. In the pursuit of that theory, as we shall show below, the

plaintiff's officers in their testimony deliberately substituted the words "IMI-Ward" whenever the word "IMI" was actually used in the events described, ignoring their oaths in their concerted endeavor to impose an unwarranted liability upon Ward by the resultant distortion of the facts.

Union's Authorization of Wilson, Denver's General Manager, to Purchase the Raw Steel on its Behalf

Under its subcontract with Fluor, Union was obligated to purchase, fabricate and erect steel required for Levels 2 and 3 and the Blast Lock structure at the Tucson project (Jt. Exh. 2). Under its subcontract from Matich Bros. and Sundt, it was similarly obligated to purchase, fabricate and erect the structural steel for Level 2 at the Vandenberg project (Jt. Exh. 4). Thereafter, Union subcontracted to the joint venture of IMI-Ward (Jt. Exh. 8) the work of fabricating the raw steel, reserving the task of erection for itself.

Thus, Middleton, Union's Assistant Project Manager at Tucson and previously Assistant to Lancaster, Union's Vice-President of Construction (Middleton, RT 545), testified that, under a first tier subcontract from Fluor, "Graver Tank & Manufacturing Company had the steel package" (Middleton, RT 544) and that, under the joint venture subcontract, the joint venture was required to fabricate the raw steel which was to be installed by Graver at the site (Middleton, RT 600):

> "Q. (By Mr. Warnock) Regarding the steel that was furnished by Mosher, do you know who *installed* that material at the sites?
>
> A. *Graver Tank & Manufacturing Company.*
>
> Q. Didn't IMI-Ward have a contract?
>
> A. *Not for installation, only for furnishing.*

Q. Didn't the contract call for installation of the steel by IMI-Ward?

A. *Not the structural steel.* The only thing they actually physically installed on the sites was the silo closure door, fabricated and installed."

Prior to October 13, 1961, the task of fabrication had been assigned by IMI to its Denver Steel and Iron Division whose general manager was Sam A. Wilson. To purchase the raw steel, Union had previously authorized Wilson to negotiate on its behalf with various steel companies and advise the steel companies, when negotiations were satisfactorily concluded, that Graver's purchase orders would be issued for the steel (FF 16, R 1225). All of the raw steel required for the Tucson and Vandenberg projects was purchased by Union under Wilson's authorized negotiations on behalf of Union and his authorized representations to the steel companies, carried out by Union, that Graver's purchase orders would be issued therefor. (FF 17, R 1225)

The Meeting Between Mitchell and Burton of Mosher and Wilson of Denver in Dallas on October 13, 1961

Because of an accelerated delivery schedule, Union officials became concerned, prior to October 13, 1961, that Denver's production facilities were not adequate to fabricate Union's raw steel and deliver the fabricated product to Union within the time required by the delivery schedule. (Wilson, RT 180, 183; 184-185) In the last week of September, 1961, Lancaster, Graver's Vice-President for Construction, and Harle, its Director of Purchases, "expressed considerable concern and were quite insistent on an im-

proved delivery schedule by whatever means necessary." (Wilson, RT 185) Wilson surveyed the situation locally in Denver but could find no one to take on the work. (Wilson, RT 232)

On October 10th or 11th, a meeting was held in Wilson's office in Denver which was attended by Messrs. Lancaster and Harle. (Wilson, RT 185) During that meeting, Wilson was directed by the Union representatives "to place the work elsewhere to meet delivery." (Wilson, 186; 232) He then thought of Mosher as a possible fabricator; mentioned Mosher's name to Lancaster and Harle; and received their approval. (Wilson, RT 232-234) Before he telephoned Mitchell at Dallas, Wilson told Lancaster and Harle that "Mosher would not accept the credit of Denver Steel and Iron and *that a Graver purchase order would have to be forthcoming* if Mosher was to do any work at all." (Wilson, RT 233) Lancaster and Harle told Wilson that "*a Graver purchase order would be forthcoming*" if he could negotiate a satisfactory deal. (Wilson, RT 234)

Wilson arrived in Dallas on October 13th and met with Mitchell and Burton. (Wilson, RT 186; 234) Mitchell testified that, after agreeing with Wilson upon all of the terms and provisions of a fabrication contract, the following transpired (Mitchell, RT 74-75):

> "Q. (By Mr. Purnell) Now, you told us what you said to Mr. Wilson. Now, not discussions, but what did Mr. Wilson say to you, as well as you can recall?
>
> A. I further asked Mr. Wilson how he proposed to handle this order. Mr. Wilson said to me *that he knew that we would not accept Idaho-Maryland Industries' credit for this amount of money* and he had checked with a Mr. Lancaster and a Mr. Harle of

Graver Tank and he was acting in their behalf to the extent that he would, *that Graver's purchase order would be forthcoming for us for any materials that we furnished.*

* * *

Q. Did you and Mr. Wilson and Mr. Burton cover all of the factors which you considered necessary to your understanding for the fabrication?

A. Yes, we did.

Q. Did Mr. Wilson indicate that he was satisfied?

A. Yes, he did."

Burton testified upon this score as follows (Burton, RT 247):

"Q. Well, you were telling us what happened on October 13. Go ahead and tell us.

A. Mr. Mitchell asked Mr. Wilson who the order would be entered to and Mr. Wilson said it would be entered to Graver Tank and Manufacturing Company *because he knew that our company would not accept the credit of Denver Steel and Iron, or IMI.*"

Burton also testified in his deposition as follows (Burton Deposition, pp. 50-52):

"Q. On October 13, 1961, when Mr. Sam Wilson came to your office in Dallas did he tell you something about the project for which he was attempting to enlist your company's aid?

A. He didn't go into great detail, he just said he was in trouble and needed help.

Q. And he explained that his own company, Denver Steel and Iron Works, could not fabricate the steel necessary for the Tucson project within the time prescribed?

A. That is correct.

Q. And he told you during the course of that conference that he was there for the purpose of making an arrangement with Mosher Steel Company for the fabrication of that steel within the time required?

A. That's right.

Q. And he also told you, did he not, on that occasion, and during the course of that conference *that he was appearing as an agent for Graver Tank & Manufacturing Company for the purpose of procuring this fabrication?*

A. That's right.

Q. Was the name of Ward Industries, Inc., mentioned at all during the course of that conference?

A. I am certain that it was. In what way, I don't remember, but I am certain that it was.

Q. But you have no present recollection at the present time of the manner in which that reference was made or the purpose for which it was made?

A. *The purpose for which it was made was on the matter of money, and he knew that we wouldn't accept the credit of IMI-Ward or Denver Steel and Iron.*

Q. *Now, he said he knew that, did he not?*

A. *Yes sir.*

Q. And there was no question in your mind, or in the mind of Mr. Mitchell at that time, that that was indeed the fact, *that Mosher would not accept the credit of Ward Industries, Inc., or Denver Steel and Iron Works?*

A. *That is the way it was presented.*

Q. And you made that perfectly plain to Mr. Wilson at that time?

A. There was no chance of misunderstanding that. We didn't make it plain, he made it plain to us.

Q. *And you agreed that that was the fact?*
A. *Yes.*"

During the course of the meeting on October 13, Mitchell called Moore at Houston and asked "if he would accept the credit of Graver Tank and Manufacturing Company." (Burton, RT 249) Moore promptly replied that the "Graver Tank credit was satisfactory." (Burton, RT 249) The rapidity with which Moore accepted the credit of Graver was attested by him as follows (Moore, RT 433-434):

"Q. I think you testified on your direct examination that your very first contact with this proposed project came in a telephone call from Mr. Mitchell on October 13, 1961, is that correct?

A. Yes.

Q. And Mr. Mitchell asked you whether or not credit of Graver Tank was good, is that right?

A. Yes.

Q. And you didn't hesitate at all, you told him that the credit of Graver Tank was good, did you not?

A. That's correct.

"Q. You didn't have to stop to make any investigation or obtain any credit report?

A. No."

On Monday, October 16th, Mitchell prepared, signed and mailed to Wilson a letter dated October 16th which constituted a complete agreement between Mosher and Graver under the express terms of which the plaintiff was to receive a formal purchase order from Graver. (Mosher Exh. 1) By the 16th, Wilson had returned to his Denver office and told Harle—before Mitchell's letter was received—of the agreement which he had reached with Burton and

Mitchell in Dallas. (Wilson, RT 235) Both Harle and Owenby of Graver, to whom Wilson reported, "were very pleased." (Wilson, RT 235-236)

The Letter Agreement of October 16, 1961 Between Mosher and Union

The letter of October 16, 1961 is precise and explicit. In the language of the District Court's Findings of Fact, it covered "the complete terms, prices and conditions of a contract for Mosher to fabricate steel required for the Tucson project. . . ." (FF 21, R. 1226)[4] It is addressed to Graver and expresses Mosher's thanks for *"your order* covering the fabrication of approximately 1,200 tons of *your material* . . .". It notes that "we have entered our Shop Order 66109 to cover the fabrication of *your material* . . .". It provides that "It is agreed that a formal purchase order will be forthcoming from Graver Tank & Manufacturing Company to cover the fabrication of this material." The letter further states that "it will act as an interim purchase order pending receipt of Graver Tank & Manufacturing Company's formal purchase order."

Wilson signed the letter on October 20, 1961, in the space provided therefor (Mosher, Exh. 1, p. 3), handed a copy to Harle who was in his office at the time (Wilson, RT p. 184), distributed copies to IMI and Graver, and mailed the original back to Mosher. (Wilson, RT 184) To Wilson, it constituted *"the full and complete agreement."* (Wilson, RT 184)

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[4] References to the District Court's Findings of Fact will be prefixed by the letters FF. References to its Conclusions of Law will be prefixed by the letters CL.

Harle asked Burton to come to Denver "to work out the mechanics of shipping papers, the usual sort of things in fabrication type of job." (Wilson, RT 185) Burton came to Denver on the 23rd of October and met with Harle and Wilson. (Wilson, RT 185) Harle, Burton and Wilson went over the letter of October 16th "item by item". (Wilson, RT 187) *"Mr. Harle assured Mr. Burton a purchase order would be forthcoming."* (Wilson, RT 187)

According to Burton, the following transpired at the meeting of the 23rd (Burton, RT 257-258):

> "Q. (By Mr. Purnell) Go ahead, Mr. Burton.
>
> A. Mr. Harle also made the statement that this letter would serve as an interim purchase order until a formal purchase order could be sent to us by Graver, and that Mr. Wilson had signed it acknowledging it and had returned it to our Dallas office.
>
> The Court: Harle said that?
>
> The Witness: Yes, sir.
>
> Q. (By Mr. Purnell) Did he give you any estimate of when to expect the formal purchase order?
>
> A. He said it might be two or three weeks."

That Mosher regarded the letter of October 16, 1961, when signed and returned by Wilson, as a valid and subsisting contract, *unconditionally binding upon Graver and itself,* was confirmed by both Mitchell and Moore. Mitchell testified as follows (Mitchell, RT 151-152):

> "Q. (By Mr. Lotterman) I think you testified that this document which is dated October 16, 1961, was returned, received by your office on or about October 20, 1961, with the signature of Mr. Wilson attached thereto, is that correct?
>
> A. Received on October 26.

Q. Received on October 26. And when you received it, did you believe it to constitute a binding obligation of Mosher and Graver?

* * *

A. *Yes, I considered it a binding agreement.*

Q. Did you consider your company was unconditionally bound to perform the work and make the deliveries required by that document?

A. *Yes, I did.*

Q. Did you consider that when that work was performed and those materials were delivered that Graver would be unconditionally bound to pay the purchase price for that work and labor?

A. *Yes, I did.*"

Moore was equally positive (Moore, RT 434-435):

"Q. Now, when did you first see the April 16, 1961, letter which we have called here the Mitchell-Wilson letter?

The Court: You're referring to April, these are October.

Mr. Lotterman: I mean October, I'm sorry, your Honor.

The Witness: I can't be sure, I think that the date would be sometime after October, immediately after October the 20th, I'm not positive as to the exact date.

Q. (By Mr. Lotterman) And when you first saw it did it bear Mr. Wilson's signature, or did it not?

A. Yes, sir, it did.

"Q. *And did you consider that letter to be a binding and valid obligation?*

A. *Yes.*

Q. *Of both parties?*

A. *Yes.*

Q. And it was then that you directed the shop order to be set up, is that right?

A. Yes.

Q. Had your company commenced engineering and other labor in connection therewith?

A. *Yes.*"

Wilson, for Union, likewise testified that the letter of October 16, 1961, when signed, constituted "the full and complete agreement." (Wilson, RT 184)

Mosher's Performance Under the Oral Agreement of October 13 and Letter Agreement of October 16, 1961

Mosher moved swiftly, promptly and expeditiously to commence its work under the letter agreement of October 16, 1961. Even before that letter was received by Mosher with Wilson's signature thereon on October 26, 1961 (Mitchell, RT 69), Mitchell entered, on October 17, 1961, "the shop orders necessary for us to produce the product." (Mitchell, RT 78-79) being Mosher Order No. 66109 (Jt. Exh. 12) Shop orders are the "orders that we prepare for inter-company production of a product, *once we have agreed to do the fabrication.*" (Mitchell, RT 78) According to Mitchell, "no work will be done on any project without a shop order being prepared and issued." (RT 78)

The shop order (Jt. Exh. 12, RT 79) listed Graver as the "Customer" and provided that delivery was to start "11-11-61 at rate of 3 sites each 2 weeks." Both the bill of lading and the invoices were to be sent to the "Customer". It further provided that Mosher was to "fabricate cus-

tomer's material in accordance with customer's detail drawings required for Levels 2 & 3 & Blast Lock Structure" for the Tucson project. It also provided (Item 8) that "Customer to be invoiced at unit price #1 for all materials fabricated under Item #1 above"; that (Item 9) "Customer to furnish at no cost to Mosher all materials required to fabricate Item #1" . . .; and that (Item 12) "Customer is to pay any inbound or outbound freight we are required to pay. For this Customer is to be invoiced in accordance with price #3." The credit was marked "open" (Mitchell, RT 80), which meant that the customer's credit had been approved by the credit department. (Moore, RT 351)

Upon receiving a copy of the shop order at Houston, Burton took the drawings into the engineering department "and asked them to put it *on a crash basis,*" to get the materials "into the shop just *as quick as they could,* because we had to get started working on it *at the earliest possible moment* in order to make the deliveries that I had agreed to make." (Burton, RT 250)

The plaintiff's weekly production records for the week ending October 24th showed that it had "considerable labor in the engineering department between October 18 and October 24" (Burton, RT p. 251), and also showed, during the week of October 23, a good deal of labor in the shop "in getting set up and trying to get off the ground". (Burton, RT 280) By November 16, Mosher had expended more than $40,000 in shop work, fabrication costs and freight. (FF 24, R 1227) Until the week ending November 21st, 1961, the customer recorded upon these production records was "Graver Tank." (Pltff. Ex. 34; Burton, RT 333) Thereafter, and continuously until the completion of the plaintiff's performance, the customer was recorded as "Idaho-Maryland" (Pltff. Ex. 34; Burton, RT 333) The circum-

stances under which that change was effected, and the reasons therefor, will now be reviewed.

The Visit of Holmes and Orr of IMI to the Mosher Offices on October 31, 1961

According to Burton, on October 31, 1961, two men, Holmes and Orr, came to his office in Houston unannounced. (RT 261) They asked about the plaintiff's progress on the Tucson job and then inquired whether Mosher could also fabricate some steel for the Vandenberg project. (Burton, RT 261) After working out a schedule for Vandenberg which Burton felt that Mosher could meet, he was asked about a price. Burton replied that the matter of price came within Mitchell's province. (Burton, RT 262) That afternoon, Burton, Holmes and Orr met with Mitchell in Dallas and received a price for the additional Vandenberg work. (Burton, RT 262)

To this date, to wit, the afternoon of October 31, 1961, it was as clear as the noonday sun that Mosher was proceeding, on a crash basis, under a completely *concluded and binding contract* with Graver; that it was relying solely, entirely and exclusively upon the credit of Graver; and that neither Ward, IMI, nor the joint venture were involved in the Mosher transaction in any manner whatsoever. It was indubitably at this point in its preparation for trial that Mosher conceived of a testimonial strategem with which to sustain its legal theory of liability against Ward. Its witnesses proceeded to adopt in concert what appeared to be the simple and seemingly unassailable expedient of substituting the words "IMI-Ward" or "joint venture" whenever the word "IMI" had been used during the course of the conference. Thereupon, Burton testified as follows upon his direct examination (Burton, RT 262-264):

"Q. Go ahead, Mr. Burton.

A. *And during the course of that meeting they raised the question about changing our customer from Graver to IMI-Ward.* And we replied that that would have to be approved by Mr. Moore, but we felt sure that he would not accept it without Graver being responsible for it, for payment of our work.

* * *

Q. (By Mr. Purnell) I think the question was: *'Did they tell you why they wanted you to deal with IMI-Ward?'*

A. *They said it would be much easier and simpler for them, from the accounting standpoint, to have us accept an IMI-Ward purchase order.*

Q. Did you call Mr. Moore?

A. Yes.

Q. Where was Mr. Moore?

A. In Houston.

Q. And you called him from Dallas?

A. Yes, sir.

Q. What did you tell Mr. Moore?

A. I told him that Mr. Orr and Mr. Holmes were there in Dallas discussing this Tucson job and they wanted us to take on three more levels for Vandenberg *and asked the question if we would accept an IMI-Ward purchase order* and I asked him what his feelings were in the matter. *And he said, well, he didn't care whose purchase order it was as long as Graver would be responsible for payment.*"

Burton's device of substituting the words "IMI-Ward" for the word "IMI" in his carefully amplified version of the conference with Holmes and Orr on October 31, 1961, was completely exploded on cross-examination. Burton's deposition had been taken in this case on June 27, 1963

(Burton, RT 338), and he had testified fully at that time to the meeting with Holmes and Orr. After his deposition had been transcribed, it had been sent to him for his examination and review. (Burton, RT 338) After reading it, he signed and swore to the truth of the transcript, whereupon it was filed in the District Court. (Burton, RT 338-339)

In his sworn testimony at that time, *Burton never mentioned the words "IMI-Ward" or "joint venture"* in describing what occurred on October 31, 1961. The record is crystal clear (Burton, RT 339; 340-342):

> "Q. Now, on that occasion, on Page 23 in answer to a question this is what you said about October 31, 1961.
>
> 'On October 31 I recall Mr. Holmes and Mr. Orr *of IMI* came into my office and asked me if I was getting along with the Tucson job.'
>
> Now, is that statement true?
>
> A. Yes, sir.
>
> Q. And then further you testified that you went with them to Dallas, and on Page 24 this was your answer:
>
> 'And then I went with them to Dallas and sat down with Mr. Mitchell and worked out things with the sales department, what they were concerned with. And during the course of events they raised the question about transferring the contract *from Graver to IMI.*'
>
> Is that testimony true?
>
> A. If that's what the record shows, that's right, I testified to that.
>
> * * *

Q. (By Mr. Lotterman) And then in this deposition did you say, and I'll complete the answer; 'And then I went with them to Dallas and sat down with Mr. Mitchell and worked out things with the sales department, what they were concerned with. And during the course of events they raised the question about transferring the contract *from Graver to IMI.*

'We told them we did not have authority to do that, that it was understood when we took the order that it would be entered for Graver and I was sure that the credit department would not approve such an arrangement, but that we would get Mr. Moore on the telephone and let him talk to them about the matter.'

Is that testimony true?

The Court: Mr. Lotterman, I said a moment ago, the proper way to do this is to ask him if he made that answer.

Q. (By Mr. Lotterman) Did you make that answer upon the deposition taken of you in this cause back in June of 1963?

A. Yes, sir.

Q. I now read to you additional questions and ask you whether or not you made the answers as I read them.

'Question. And did you do that?

'Answer. Yes, sir.

'Question. Were you on the line?

'Answer. No, sir.

'Question. Did you step out in the hall?

'Answer. No, sir, I sat there and listened to one end of the conversation.

'Question. What was said at that end of the conversation?

'Answer. Well, *they said* on account of bookkeeping or processing of the invoices and so forth for payment *that it would be better if the order or the invoices would be handled through IMI.*

'Question. What else?

'Answer. I don't know what Mr. Moore told them during that conversation. Of course, I know what he did tell them.

'Question. What did you understand he told them?

'Answer. He told them *that it was all right with him whoever the order was transferred to, as long as Graver would be responsible for the payment of the material.*'

Did you make those answers to the questions which were asked of you upon your deposition?

A. Yes, sir."

Mitchell's tactic upon his direct examination had paralleled Burton's. He, too, had testified that Holmes and Orr had advised him "that they were with the joint venture of Idaho-Maryland Industries and Ward Industries" (Mitchell, RT 89), and had requested the plaintiff's representatives on October 31, 1961 to accept "a joint venture purchase order in lieu of the formal Graver purchase order" for the work involved. (Mitchell, RT 89) He also referred to the telephone call to Moore and Moore's alleged statement "that we would not accept a joint venture purchase order unless Graver Tank assured Mosher of payment of all invoices." (Mitchell, RT 90)

Mitchell's attempt to embroider the factual cloth and thereby impose a liability upon Ward as an "additional obligor" was demolished as completely as Burton's had

been. After he had vehemently denied that Holmes and Orr had actually used "the words IMI and not Joint Venture" and that they had wanted "to transfer the purchase order from Graver to IMI" (Mitchell, RT 158), he was confronted with an affidavit to which he had sworn on June 1, 1963 and reaffirmed during the course of his deposition in this cause. (Mitchell, RT 159-162) In that affidavit, which he reaffirmed anew as true and correct (Mitchell, RT 162), he had sworn as follows (Mitchell, RT 161-162; Ward's Exh. F, RT 163):

> "A few days thereafter representatives of *Idaho-Maryland Industries, IMI,* appeared in affiant's office to discuss delivery dates and other details, and asked affiant and Mr. Ralph Burton, vice president of the Mosher Steel Company, whether Mosher Steel Company would deal in the matter with *Idaho-Maryland Industries* rather than with Graver Tank and Manufacturing Company. Such representatives were informed by affiant and the said Ralph Burton that Mosher Steel Company would not deal with *Idaho-Maryland Industries, IMI,* unless Graver Tank and Manufacturing Company remained liable under the agreement."

Following in the testimonial footsteps of Burton and Mitchell, Moore's contribution to Mosher's embellished version of the Holmes and Orr visit met with precisely the same fate. Moore testified that, on October 31, 1961, Burton called him from Dallas and told him that Holmes and Orr "had requested that we change the order from Graver to Idaho-Maryland-Ward Industries as it would be more convenient for accounting purposes, and asked if I would accept it on that basis." (Moore, RT 353) Moore told Burton that "we would accept it *providing*

Graver would be responsible for payment." (Moore, RT 354)

Moore's attention was directed to his sworn deposition in this cause upon this matter. At that time, he had testified as follows (Moore, RT 405):

> "Q. Well, let me refer you to your deposition at Page 13 of the first deposition, Line 9.
>
> 'Question. Well, when did you first learn that the purchase order—' That is referring to the Graver purchase order—'had not been forthcoming?
>
> 'Answer. Well, the first time I learned it was about October 31, I believe.
>
> 'Question. *That was when Holmes and Orr came and wanted the customer to be changed to IMI?*
>
> 'Answer. *Yes.*
>
> 'Question. Did you meet with them?
>
> 'Answer. No, sir.
>
> 'Question. How did you learn about their request?
>
> 'Answer. Well, I heard it through the telephone conversation, I was called.
>
> 'Question. From Mitchell?
>
> 'Answer. Burton in Dallas.
>
> ' Question. From Burton in Dallas?
>
> 'Answer. Yes.' "

On further cross-examination, he testified as follows (Moore, RT 437):

> "Q. (By Mr. Lotterman) All right. Now, during the course of your direct examination you had testified that Burton had told you that Holmes and Orr came in and wanted the customer changed. Do you remember that?
>
> A. Yes.

Q. Well, now, to whom did they want the customer changed? *What name did they want to substitute?*

A. *They wanted the name changed to Idaho-Maryland for convenience.*

Q. And that's what you testified to on your deposition, is that correct?

A. (Affirmative headshake.)

Mr. McConnell: I don't think the record got his answer, he nodded his head.

The Witness: *Yes.*"

In view of the foregoing quotations from the record, can it be doubted that Mosher's attempt to add Ward as an "additional obligor" to Union had completely collapsed; that, in actual fact, Holmes and Orr had requested a change in the name of the customer to IMI "for convenience"; that the name of Ward or the joint venture had never been mentioned and that the request had been rejected unless Graver "remained liable under the agreement" (Mitchell, RT 161-162) and agreed to pay Mosher "direct." (Moore, RT 362)

Harle's Conference With Mosher on November 7, 1961 and Moore's Telephone Talk With Page of Graver on That Day

On November 7, 1961, Harle, Graver's Director of Purchases, came to see Burton and Moore in Houston, to ascertain the status of contemplated deliveries because no shipment had been made as yet by Mosher. Harle was informed at that meeting that, because the "credit matter" had not been straightened out, Mosher had placed "a stop order" upon the very first shipment which was then virtually ready for delivery.

What transpired at that time was related by Burton on cross-examination as follows (Burton, RT 342-344):

"Q. (By Mr. Lotterman) Now, you were also examined during the course of this deposition to your meeting with Mr. Harle on November 7, 1961, and I ask you now whether you were asked the questions which I am about to read and made the following answers.

Mr. Watkins: What page?

Mr. Lotterman: Page 61.

'Question. Now, we come to your meeting with Mr. Harle on November 7, 1961. I think you testified that meeting took place in your office in Dallas?

'Answer. In Houston.

'Question. Mr. Harle came in and talked to you and Mr. Moore?

'Answer. That is correct.

'Question. And he came in for the purpose, as I understand it, of lifting a stop order which had been placed upon your very first shipment. That is he was concerned about the fact that shipment was not forthcoming?

'Answer. I don't think he knew there was a stop order on it when he came in. He knew shortly after he got there, but the time he came in I doubt he knew it.

'Question. But the purpose of his visit was to see that the shipment was forthcoming?

'Answer. Right.

'Question. That was the first shipment?

'Answer. The first shipment, which wasn't scheduled at that time to move until the following week.

'Question. You explained to him the reason why the shipment was not forthcoming?

'Answer. I explained to him that if we didn't get the credit matter straightened out it would not be forthcoming.

'Question. And then he called Mr. John Page at the Graver Company on the telephone in your office?

'Answer. Yes.

'Question. And he got Mr. Page on the wire?

'Answer. Yes.

'Question. Can you tell me what you heard Mr. Harle say to Mr. Page when he got him on the telephone?

'Answer. He told Mr. Page that he had started working on an order in connection with the Tucson Missile Base and *that the IMI people had requested a transfer of the order to that name for accounting purposes, but that Mosher would not transfer the order until Graver would stand good for payment,* and that Mr. Moore was present and that he would let him explain to him the problems involved.'

Did you make those answers to the questions which I have just read?

A. Yes, sir."

And further (Burton, RT 346-347):

"Q. (By Mr. Lotterman) And then turning over to Page 64.

'Question. Tell us what Mr. Moore had to say in substance.

'Answer. *Mr. Moore said that IMI had requested a transfer of the order on the contract from Graver, but that we wouldn't accept it without Graver being*

responsible for the payment of the material, and if that were forthcoming, then we would go ahead with the rest of the transfer.'

Did you make those answers as read to the questions which were asked upon the deposition?

A. Yes, sir."

Moore's Telephone Talks With Orr and Morton of IMI on November 13, 1961

On November 13, 1961, according to Moore, Orr telephoned him and asked him to accept "the order strictly on the credit of IMI-Ward Industries for shipment of the material." (Moore, RT 358) Moore adamantly refused. Then, according to Moore, Morton, IMI's president, got on the telephone and repeated the request. Again, Moore refused. "I told him", testified Moore, *"we would not accept it on that basis."* (Moore, RT 359) Moore insisted that he would not release any of the shipments unless Union paid Mosher direct for Mosher's work. (Moore, RT 360) Moore's unqualified rejection, on November 13, 1961, of Orr and Morton's request ended all further attempts to induce Mosher to accept any credit in this transaction other than Graver's. (Moore, RT 360) "There wasn't much else to say after that." (Moore, RT 360)

Moore's Telephone Talk With Page of Graver on November 15, 1961

Moore testified on his direct examination that he called Page on November 15, 1961, and advised him that he would not release a shipment then ready for delivery, a shipment Harle was anxious to obtain, unless Graver agreed *"to pay us direct. . . ."* (Moore, RT 362) He testified that

Page did agree to do so and promised a confirmatory letter in a day or so. (Moore, RT 362) Upon the receipt of a telegram from Page on the following day, Moore released the shipment.

Mosher's Exclusive Reliance Upon the Credit of Graver and Its Adamant Refusal to Accept the Credit of Ward, IMI or IMI-Ward

Prior to November 15, 1961, when, according to Moore, Page had promised him *"that Graver would pay"* (Moore, p. 362), the Dallas office of Mosher had received on November 10, 1961, two purchase order forms of IMI. (Moore, pp. 439-440, Jt. Exs. 9 and 10) They were both signed by Frank J. Wright, buyer for IMI. (Mitchell, RT 153) One pertained to the Tucson project; the other to Vandenberg. Both contained the typed inscription: *"Confirming Agreement between Wilson, Mitchell and Burton dated 10/13/61."* Both also contained the direction that all shipments were to be made to "Graver Tank & Mfg. Co." (Mitchell, RT 152, 154)

In accordance with Moore's instructions, these papers were kept by Mitchell on his desk in Dallas with "no action on them." (Mitchell, RT 169) They were not sent to Moore in Houston until November 17, 1961 (Moore, RT 441), two days after Moore's telephone conversation with Page and one day after Moore's receipt of Page's telegram and his release of the initial shipment.

On November 16, 1961, the day after Moore's conversation with Page, and simultaneously with the receipt of a telegram from Page, Moore released the order for shipment. (Moore, RT 365) On the same day, he instructed Mitchell to enter a supplement, #2, "to change customer's name from Graver Tank & Manufacturing Co. to Idaho-

Maryland Industries, Inc." (Jt. Ex. 13; Mitchell, RT 91-93; 169) The supplement also recorded the fact that "all shipments are to be made to Graver Tank and Manufacturing Co." at Tucson (Jt. Ex. 13). Under this supplement, the order was still marked "open." At the same time, Moore directed the entry of a shop order for the Vandenberg fabrication. (Pltff. Ex. 22A; RT 101)

It is unconditionally conceded by the plaintiff that its release of the shipment on November 16, 1961 and all subsequent deliveries, as well as the entry of Supplement #2, and the Vandenberg shop order were only induced by and undertaken solely in reliance upon Page's promise *"to pay us direct. . . ."* Moore testified in unequivocal language as follows (Moore, RT 445):

> "Q. Now, I'd like to call your attention, Mr. Moore, to your testimony with regard to a telephone conversation with Mr. Page on November 15, 1961. After that telephone conversation you released the shipment, did you not?
>
> A. Yes.
>
> Q. *And your release of those shipments was based, was it not, upon Page's statements to you as you recounted them in your testimony?*
>
> A. *Yes.*
>
> Q. *You would not have released those shipments unless Page had made those statements to you, is that correct?*
>
> A. *That's correct."*

Moore had made it unmistakably plain that *"he didn't care whose purchase order it was* as long as Graver would be responsible for payment." (Burton, RT 264) He had told Holmes and Orr "that it was all right with him *whoever the order was transferred to,* as long as Graver would

be responsible for the payment of the material." (Burton, RT 342)

As long prior to November 16, 1961 as September 19, 1961, Moore had known from a Dun and Bradstreet report of that date that a joint venture of IMI and Ward had been formed and had received a subcontract from Graver for certain missile construction work at Tucson. (Moore, RT 432; Jt. Ex. 56) Prior to the visit of Holmes and Orr, he had received reports from people who had been dealing with the joint venture about the credit of IMI and Ward (Moore, RT 437-438). Based upon those reports, he had concluded prior to October 31, 1961, that the credit of IMI, Ward and IMI-Ward collectively as a joint venture were completely *unsatisfactory,* a conclusion which was reinforced by credit reports which he subsequently obtained. Moore testified as follows upon cross-examination (Moore, RT 437-439):

"Q. (By Mr. Lotterman) Now, prior to this date you had reports and received reports of the credit of IMI, had you not?

A. Yes.

Q. And you had received reports, that is from people and buyers and customers who had dealt with the Joint Venture, you had reports of the credit of Ward, is that right, prior to October 31, 1961?

A. I had—

Q. I'm not talking about written reports, I'm talking about information which you had obtained.

A. Yes.

Q. In the trade?

A. Yes.

Q. *And on October 31, 1961 you had concluded that the credit of IMI was not satisfactory at all, is that right?*

A. *That's correct.*

Q. *And you also concluded the credit of Ward was not satisfactory at all?*[5]

A. *That is correct.*

Q. *And you concluded in addition that the credit of IMI and Ward collectively as a Joint Venture was not satisfactory at all?*

A. *That is correct.*

Q. *Now, on October 31, 1961 you would not accept the credit of Ward, would you?*

A. *No.*

Q. *Nor would you accept the credit of IMI?*

A. *No.*

Q. *Nor would you accept the credit of IMI-Ward collectively?*

A. *No.*

Q. Now, you made your decision on October 31, 1961, not to accept those credits without any credit report, based upon prior information which you had gathered during the course of your business transactions?

A. That's right.

Q. And *after this conversation* you wanted to see if their credit, if the IMI-Ward credit, was really as bad as the people had stated it was, is that right?

A. I wanted a report, yes.

Q. And then you got reports?

A. Yes.

---

[5] None of Mosher's admissions that it had continually refused to accept the credit of Ward or the Joint Venture of IMI-Ward, precisely as it had refused to accept the credit of IMI, is reflected in the District Court's Findings of Fact or Conclusions of Law. The District Court's sole reference to this testimony by Mosher is the statement in CL 4 that "Mosher did not deal with, nor rely upon the credit of, IMI, individually . . ." (R. 1238). No reason is assigned by the District Court for its failure to refer, in CL 4 or elsewhere, to Mosher's refusal to deal with, or rely upon the credit of, Ward or the joint venture.

Q. *And it was precisely as bad as they said it was, isn't that correct?*

A. *It was not acceptable."*

Moore had likewise testified upon his deposition as follows (RT 466-467; Deposition, pp. 12-16; 16-18):

"Q. And as you recall, the letter in question did provide that there would be forthcoming from Graver a purchase order?

A. Yes."

• • •

"Q. Well, when did you first learn that the purchase order had not been forthcoming?

A. Well, the first time I learned about it was October 31, I believe.

Q. *And that was when Holmes and Orr came and wanted the customer to be changed to IMI?*

A. Yes.

Q. And did you meet with them?

A. No sir.

Q. How did you learn about their request?

A. Well, I heard it through a telephone conversation. I was called—

Q. From Mitchell?

A. Burton in Dallas.

Q. From Burton in Dallas?

A. Yes.

Q. *At that time did you make any investigation of the credit of IMI or Ward Industries?*

A. *Yes, I made an investigation after that in a conversation.*

Q. What kind of an investigation did you make, the regular routine of getting Dunn and Bradstreet reports and credit clearance? What sort of a credit clearance do you use?

A. Dunn and Bradstreet, and Wholesale Credit and Retail Credit".

* * *

"Q. Was this investigation made of both IMI and Ward Industries?

A. Yes, sir.

Q. *Was it satisfactory?*

A. *No, it was not satisfactory.*

Q. *Either as to Ward Industries or IMI?*

A. *In my opinion it was not satisfactory.*

Q. *Not satisfactory as to IMI?*

A. *No.*

Q. *Was it satisfactory as to Ward Industries?*

A. *I did not consider it satisfactory as to either one.*"

* * *

"Q. What did you tell them?

A. I told Burton that we would not substitute IMI-Ward for the Graver contract without assurances from Graver that they would be on the contract.

Q. You told him that as soon as he phoned you?

A. Yes.

Q. Then why did you go to the trouble of investigating the IMI-Ward credit?

A. I had information before that the credit wasn't too good.

Q. I understood you to testify that after this call from Burton you requested reports from Wholesale Credit and Dun & Bradstreet on IMI-Ward?

A. That is correct, but I made the decision without the reports from previous information, not from credit reports.

Q. And what was that previous information?

A. I had been informed right from the very beginning that those they were dealing with stated that *the credit was no good for IMI-Ward Venture.*

Q. You mean the buyers themselves said their credit wasn't any good?

A. Certainly."

* * *

"Q. Well, if you had already decided that you were going to insist on Graver guaranteeing this contract, why did you go ahead and go to the expense of getting an IMI-Ward credit investigation?

A. Quite often we get credit reports on companies that are not—that we do not have contracts with.

Q. *Well now, why did you do it in this case?*

A. *Well, frankly, I wanted to see if it was as bad as they said it was.*

Q. *And was it?*

A. *Yes.*"

In view of the foregoing testimony, it is not surprising that Mosher never signed or returned any acknowledgment copies, as the IMI purchase order forms of November 3, 1961 required upon their face. (Moore, RT 441-442; Mitchell, RT 156-157; Ward Ex. O) Those forms likewise provided that they were "subject to the terms and conditions shown on the reverse side hereof". (Mitchell, RT 170) Condition 1 upon the reverse side read in each instance as follows: "This purchase order constitutes a binding contract on the terms set forth herein when it is accepted by the seller, either by acknowledgment or commencement of performance." (Mitchell, RT 170) It is likewise not surprising that Mosher emphatically denied that it had commenced its performance for the Tucson project under those documents (Mitchell, RT 170-171) "Considering itself bound", Mosher commenced its performance, as the District Court itself had found, "under the October 13, 1961 oral agreement . . ." (FF 24, R 1227).

Mosher's Conclusive Admissions That it Had Never Looked to IMI or Ward for Payment From the Commencement of its Work Until its Completion

If there were the faintest doubt that Ward was completely innocent of any liability to the plaintiff in this transaction, that doubt was irrevocably dispelled by the unqualified, unconditional and conclusive admissions of Moore *that, from start to finish, Mosher had never relied upon or looked to IMI or Ward for payment,* even though it was sending invoices to IMI with copies to Union.[6] (Moore, Dep. vol. 2, pp. 55-56) Those admissions are completely dispositive of the claims asserted in the plaintiff's amended complaint against Ward and require a dismissal of those claims as a matter of law. Moore's admissions under cross-examination are as follows (Moore, RT 446-447):

> "Q. When did you send your first invoice to IMI for the work which your company was performing? What was the date of that first invoice?
>
> A. I don't recall the first one, I recall the corrected ones. But they were on January 19, 1962.
>
> Q. In spite of the fact that you were sending invoices to IMI, is it not a fact that you were not looking to IMI for payment of any of those invoices?
>
> A. That is correct.
>
> Q. *And from start to finish, from the beginning of the work of your company until its completion you never looked to IMI for payment, did you?*
>
> Mr. Warnock: I object, that's a legal conclusion of the witness, even on cross examination.

[6] None of these admissions by Mosher is reflected in the District Court's Findings of Fact or Conclusions of Law.

The Court: No, he may answer.
The Witness: *That is correct, sir.*

Q. (By Mr. Lotterman) *And you never relied upon IMI for payment, from the very beginning of this job until its conclusion, is that right?*
A. *That's correct.*

Mr. Lotterman: That's all.
One more question, I'm sorry.

Q. *And if you were not relying or looking to IMI for payment, you certainly weren't looking to Ward for payment, were you?*
A. *No.*"

Moore further testified upon Graver's recross-examination (Moore, RT 453):

"Q. *Mr. Moore, you told Mr. Lotterman that you never did rely on IMI to pay you for this deal. Is that what you said?*
A. *Yes, sir.*"

Moore confirmed the testimony which he had previously given upon his deposition as follows (Moore, RT 468-469; 471):

"Q. Mr. Moore, Mr. Warnock read to you from your deposition. I now want to ask you whether you were asked the following questions by Mr. Warnock during the course of your deposition and made the following answers. Page 31, Volume 2.

'Question. You said you were never looking to IMI for payment?
'Answer. No.'

There was then marked as Exhibit 3, a document which is marked as Joint Exhibit 8.

Mr. Warnock: Page 31, of which deposition?
Mr. Lotterman: Volume 2.

'Question. All right, I will ask you if it isn't true that on March 1, 1962, two weeks after your conversation with Tom Harle you didn't write the original of that exhibit 3 to IMI, sending them the invoices and showing them that that reconciled with the materials they received?
'Answer. Yes.'"

"* * * 'Question. *Then you were looking to IMI on that day, weren't you?*
'Answer: *No, huh uh.*
'Question: *You were invoicing them, weren't you?*
'Answer: *We invoiced them all along from the beginning.*
'Question: *But you never looked to them for payment?*
'Answer: *No, sir.'*

Mr. Lotterman: That is all.
Did you make those answers to the questions I read?
A. Yes."

The testimony of Mosher's witnesses which has been reviewed above, culminating in the conclusive and dispositive admissions of Russell Moore, its Treasurer and Credit Manager, so irretrievably destroyed the plaintiffs' claims against Ward in this case that any further discussion of fact or law would ordinarily appear to be superfluous. However, in view of the District Court's ultimate determination that Ward became an additional obligor for Union's indebtedness to Mosher, a review of the bases for that decision becomes essential.

The District Court's Findings of Fact and Conclusions of Law against Ward

The reasoning by which the District Court arrived at its conclusion that Ward became liable to Mosher for Union's debt is set forth in the last three sentences of Finding of Fact #39 (R 1232-1233) and #4 of its Conclusions of Law (R 1238) which read as follows:

> "39. . . . By reason of Moore's telephone conversation with Page on November 15, 1961, and the telegram from Page of that date, Moore understood and had reason to understand that Graver would pay Mosher directly for all the work described in Jt. Exs. 9 and 10 in evidence. Moore authorized the supplement to shop order 66109 and the entry of shop order 66146 by reason of that understanding; and he permitted the release and shipment of the steel fabricated by Mosher pursuant to Jt. Exs. 9 and 10 upon that understanding. Had it not been for Page's statement to Moore on November 15 and Page's telegram of November 15, Mosher would not have accepted either IMI or IMI-Ward as its customer and it would not have proceeded with the work pursuant to Jt. Exs. 9 and 10 in evidence.
>
> * * *
>
> 4. IMI, in all its dealings with Mosher, was authorized to and did act for and on behalf of IMI-Ward. In furnishing, fabricating, and delivering the steel for the Tucson and Vandenberg jobs pursuant to the terms and provisions of Jt. Exs. 9 and 10 in evidence, Mosher did not deal with, nor rely upon the credit of, IMI, individually, but Mosher performed pursuant to its agreement with IMI-Ward. Ward, as a member of IMI-Ward, is obligated to Mosher by reason

of Mosher's performance of the terms and provisions on Mosher's part contained in Jt. Exs. 9 and 10, in the amount of $298,336.58 for steel furnished, fabricated and delivered to the Tucson job and in the further sum of $22,716.96 for the steel furnished, fabricated, and delivered to the Vandenberg site."

The foregoing phraseology presents a series of virtual textbook examples of pseudo syllogisms: Major premises consisting of suppositions fashioned of non-existing factual cloth; equally suppositious minor premises extended and transposed in midstream; and the ultimate *non sequiturs* offered as logically demonstrated conclusions. Thus, according to the District Court:

(1) Mosher furnished, fabricated and delivered the steel for Tucson and Vandenberg, *not* under the oral agreement of October 13, the letter agreement of October 16 and Page's oral promise and telegram of November 15, *but only* "pursuant to the terms and provisions of Jt. Exs. 9 and 10 in evidence," i.e., the IMI purchase order forms of November 3, 1961.

(2) Moore had "reason to understand" from his conversation with Page on November 15 that Union would pay Mosher directly, *not* for the work which Mosher had been employed by Union to perform on October 13, as recorded in the letter agreement of October 16, *but only* for the work "described in Jt. Exs. 9 and 10 in evidence."

(3) Had it not been for Page's promise and telegram, Mosher would have refused to continue with its work, *not* under the oral agreement of October 13 and the written agreement of October 16, *but only* "pursuant to Jt. Exs. 9 and 10 in evidence."

(4) "Although Mosher did not deal with, nor rely upon the credit of, IMI individually", nevertheless Mosher "performed pursuant to its agreement with IMI-Ward"(!) and, *quod erat demonstrandum,* "Ward as a member of IMI-Ward is obligated to Mosher . . ."

We now turn to a detailed consideration of the insupportable hypotheses and factual misstatements which culminated in the District Court's conclusion that Mosher "performed pursuant to its agreement with IMI-Ward."

A. *Mosher Did Not Furnish, Fabricate or Deliver the Steel to Union "Pursuant to the Terms and Provisions of Jt. Exs. 9 and 10 in Evidence".*

On October 31, 1961, as previously noted (supra, pp. 20 et seq.), Holmes and Orr of IMI requested Mosher to change the name of the customer to IMI "for convenience" (Moore RT 437) because "on account of bookkeeping or processing of the invoices and so forth for payment that it would be better if the order or the invoices would be handled through IMI" (Burton RT 339-342). The request was flatly rejected. Holmes and Orr were informed by Mosher that a change in the name of the customer for the bookkeping convenience of IMI would be effected upon its books *only if* Union unequivocally reaffirmed its existing obligation to pay Mosher direct under the oral agreement of October 13 and the letter agreement of October 16. Holmes and Orr stated that they would look into the matter further and let Mitchell know (Mitchell RT 90; FF 29, R 1228, 1229).

On November 10, 1961 Jt. Exs. 9 and 10 were received by Mitchell at Mosher's Dallas office (Moore RT 439-440). Mitchell was instructed by Moore to keep those papers upon his desk in Dallas with "no action on them" (Mitchell RT 169). By November 7, the date of Harle's visit to

Mosher to ascertain why no deliveries had been made, Moore had placed a "stop order" upon the very first shipment which was then virtually ready for delivery (supra, pp. 28 et seq.). The combined efforts of Harle, Orr and Morton could not lift that stop order. Moore would not release any of the shipments unless Union reaffirmed its obligation to pay Mosher direct for Mosher's work (Moore RT 360).

Not until Page had agreed on November 15 to pay Mosher "direct" (Moore RT 362) and promised a confirmatory letter was Moore induced, on November 16, and simultaneously with his receipt of Page's telegram, to take any action. It was then, and only then, and on November 16, that Moore released the order for shipment, instructed Mitchell to change the customer's name from Graver to IMI and directed the entry of a shop order for the Vandenberg fabrication. All of these acts were completed *before* Moore even saw, examined or read Jt. Exs. 9 and 10 which were then upon Mitchell's desk in Dallas. Those documents were not received by Moore in Houston until one day later, i.e. November 17, 1961 (Moore RT 441).

Moore paid no attention whatsoever to these documents after he received them in Houston. He testified (Moore Dep., Vol. II, pp. 47-48):

> "Q. Now, did you examine these documents when you received them?
>
> A. Yes.
>
> Q. And did you observe the notation which appears on both, 'Confirming agreement between Wilson, Mitchell and Burton dated 10-13-61'?
>
> A. Yes.
>
> Q. Had you advised anybody in Idaho-Maryland Industries to send that document in?
>
> A. I had not advised anyone to, no.

Q. Did Mr. Mitchell tell you whether or not he had asked Idaho-Maryland Industries to send that document in?

A. No.

Q. Had you by that time consented to the receipt of any purchase order from Idaho-Maryland Industries, Inc.?

A. I did not.

Q. Now, when those came in, what did you do with them?

A. Filed them.

Q. Did you communicate with Idaho-Maryland Industries in connection with them?

A. No.

Q. Did you instruct anyone in your company to communicate with IMI in connection with those documents?

A. No."

Although Jt. Exs. 9 and 10 required upon their face that, for acceptance, the accompanying acknowledgment copies be signed and returned, no such acknowledgment copies were ever signed or returned. (Moore, RT 441-442; Mitchell, RT 156-157; Ward Ex. O)[7] As a matter of fact, these acknowledgment copies were still in the possession of Mosher long after this action was begun. They were annexed as Exhibits 7 and 8 to Volume II of Moore's deposition[8] which is presently in the files of this court as an exhibit in this cause.

The typed inscription upon Jt. Exs. 9 and 10: "Confirming Agreement between Wilson, Mitchell and Burton dated 10/13/61"[9] are, almost verbatim, the words contained in

[7] This fact is not reflected in the District Court's Findings of Fact.

[8] This fact is not reflected in the District Court's Findings of Fact.

[9] The presence of this inscription upon each page of Jt. Exs. 9 and 10 is not reflected in the District Court's Findings of Fact.

the letter agreement of October 16, 1961 which expressly referred to the "agreement made on October 13, 1961 between Messrs. S. A. Wilson, Paul H. Mitchell and R. L. Burton." Obviously, therefore, Jt. Exs. 9 and 10 constituted an affirmation upon their face of the binding, conclusive and subsisting agreement between Mosher and Union of October 13, 1961, an agreement which contained, in the language of FF 21, "the complete terms, prices and conditions of a contract for Mosher to fabricate steel required for the Tucson project . . ." (R 1226).

Jt. Exs. 9 and 10 are merely a repetition, in *haec verba,* of the terms, prices and conditions of Union's previously consummated oral and written contract with Mosher. To say, as the District Court has said, that "Moore permitted the release and shipment of the steel fabricated by Mosher pursuant to Jt. Exs. 9 and 10 . . ." (R 1233) is to substitute a spurious verbalism for an existent and contrary fact.

Union's steel had been fabricated, as the Court itself had found (FF 24, R 1227), under the oral contract of October 13, 1961 and the letter agreement of October 16, 1961, and was released only upon Page's oral reaffirmation of Union's obligation to pay on November 15 and his telegram of the same date (FF 39, R 1233). On November 15, neither Moore nor Page referred by as much as a single word to the contents of the documents (Jt. Exs. 9 and 10) then sitting on Mitchell's desk in Dallas "with no action on them." (Mitchell, RT 169) In the entry of supplement #2 on November 16, Moore merely effected a change in the customer's name upon Mosher's books for the bookkeeping convenience of IMI and Union; he did not add a single term, provision or condition to those already contained upon the shop order which Mosher had entered more than a month before.

To Mosher, Jt. Exs. 9 and 10 were totally inconsequential. They had nothing whatsoever to do with Union's promise to pay for which Mosher had bargained and which alone induced the performance for which it sues. Mosher had no objection to accommodating the book-keeping needs of IMI or Union provided that Union's promise to pay were explicitly reaffirmed. Moore had made it clear, in terms too plain for misconstruction, that "he didn't care whose purchase order it was as long as Graver would be responsible for payment." (Burton RT 264). Union's obligation under the *oral agreement of April 13* and the *written agreement of April 16* (Mosher Proposed Finding of Fact #24, R 1390; Mosher Proposed Conclusions of Law, #s 1 and 2; R 1406) and its promise to Mosher under the *oral contract of November 15, 1961* (Mosher Proposed Finding of Fact #63; R 1397; Mosher Proposed Conclusions of Law #4; R 1407) were the only promises for which Mosher was willing to perform its work. They constituted the sole inducement for its performance and the only basis for its reliance from start to finish. The contrary assumptions implicit in the District Court's Finding of Fact #39 are totally unfounded.

B. *Jt. Exs. 9 and 10 Are Not IMI-Ward Purchase Orders*

Mosher's attempt to transform Ward into an "*additional* obligor" by the device of substituting the words "IMI-Ward" or "joint venture" for the word "IMI" in describing the conference of October 31, 1961 with Holmes and Orr predictably generated a counter gambit by Union. Fastening upon the same linguistic technique, Union sought to transform Ward into a "*substitute* obligor" by contending that, on October 31, *Mosher* had agreed to accept the credit of IMI-Ward as a substitute for, and in lieu of, the credit of Union.

For that purpose, Union called Wallace W. Orr, a former IMI employee (RT 821-824, 847), to the stand. Orr promptly demonstrated his testimonial trustworthiness by swearing that Union had transported him from Chicago to Tucson and placed him on the witness stand without knowing what he would testify to (RT 820). He further swore, unconditionally, that no contract had ever been formed between Mosher and Union, either as a result of the conference of October 13 between Wilson, Mitchell and Burton, or the letter agreement of October 16, (RT 791, 815, 826-828). He testified that he had advised Mitchell, Burton and Moore on October 31 that "we were submitting a joint venture purchase order for this material" (RT 796). According to Orr, "then Mr. Mitchell and Mr. Moore agreed to accept the purchase order of the Joint Venture" (RT 796, 814). He identified Jt. Exs. 9 and 10 as "the two purchase orders that were prepared as a result of the negotiations that we had" (RT 798), and that "the data on those came out of" his negotiations (RT 798). He had instructed Frank Wright, IMI's buyer, to send Jt. Exs. 9 and 10 to Mosher (RT 798). He further swore that Jt. Exs. 9 and 10 were prepared upon his "instructions" and that "everything" which Wright had placed upon those documents had "come from" him (RT 807).

Upon cross-examination, Orr swore that Jt. Exs. 9 and 10 conformed in all respects with his understanding of the transaction which he had allegedly negotiated on October 31, 1961 (RT 828). He was then asked to re-examine their contents upon the stand. After such re-examination, he could "see no errors in them" (RT 829).

Orr was thereupon reduced to stuttering incoherence when he was called upon to explain the typed inscription upon each page of Jt. Exs. 9 and 10 which read "Confirming Agreement between Wilson, Mitchell and Burton dated

10/13/61" (RT 829-830), the very words, in substance, which appear upon the letter contract of October 16, 1961. He was equally unable to explain why, if Mosher had agreed on October 31, 1961 to accept the purchase orders of the joint venture, both he and Morton were still endeavoring on November 13, 1961 to induce Mosher to accept "the order strictly on the credit of IMI-Ward for shipment of the material" (Moore RT 358). Orr tried to explain why Jt. Exs. 9 and 10 were purchase order forms of IMI alone, signed only by IMI designated officers, with no mention whatsoever thereon of Ward or the joint venture, by claiming that, at that time, there was no joint venture purchase order forms (RT 856). He was, however, totally unable to offer any reason why the words "and Ward Industries Corporation, a joint venture" were not typed or stamped thereon, as those words had been stamped or typed upon IMI forms and letterheads whenever appropriate for many weeks prior thereto (RT 862-863).[10]

Much could be written of Orr's total collapse and the manner in which his testimony was demolished, not only by the internal evidence of the documents themselves, but by indisputable external facts. It is entirely unnecessary. The District Court itself rejected (FF 29; R 1228-1229) Orr's testimony that Mosher had agreed on October 31, 1961 to surrender its contractual rights against Union which had been established by the oral agreement of October 13 and the letter agreement of October 16, and accept, in lieu thereof, the credit of IMI-Ward, a claim which was irrevocably shattered by Mosher's constant affirmation that

[10] Orr's testimony (RT 856) that "later we got a stamp which said Joint Venture" after November 3, 1961, the date of Jt. Exs. 9 and 10, was completely false. As appears from Union Ex. UU, as long prior to November 3 as September 18 (invoices #05125, 05127, 05191, 05193, 05195, etc.), there had been added whenever requisite to the printed inscription "Idaho-Maryland Industries", by stamp, the words "and Ward Industries Corporation, a joint venture".

it had *never* accepted the credit of IMI, Ward or the joint venture of IMI-Ward and had *never* looked to or relied upon any of them for payment from the commencement of its work until its final completion.

From the testimonial discard to which the District Court consigned Orr's discredited testimony, it managed to select, for use only *against Ward,*[11] Orr's verbal characterization of Jt. Exs. 9 and 10 as "IMI-Ward" or "joint venture" purchase orders (FF 30, R. 1229). So engrossed were Mosher, Union and, ultimately, the District Court, in attaching the label of "IMI-Ward" or "joint venture" to Jt. Exs. 9 and 10 that each of them totally ignored the following indisputable facts established by incontrovertible documents:

1. The name of the customer upon the plaintiff's shop orders was changed by Mosher itself from Graver to IMI, and *not* from Graver to the joint venture;

2. The name of the customer upon the plaintiff's weekly production records (Pltff. Ex. 34) was changed by Mosher itself from Graver to IMI, and *not* from Graver to the joint venture;

3. Mosher's accounts receivable ledger for both the Tucson and Vandenberg jobs (Jt. Exs. 17 and 18) show, as Mosher's debtor, only "Idaho-Maryland Industries Inc." and *not* the joint venture;

4. Every invoice issued by Mosher for the Tucson and Vandenberg jobs (Jt. Ex. 14) show that the materials were sold only to IMI and *not* the joint venture, with the addi-

[11] Orr's testimony *against Mosher,* that it had agreed on October 31 to accept the credit of IMI-Ward in lieu of the credit of Union, was rejected by the District Court as a complete fabrication from start to finish (FF 29, R. 1228-1229).

tional typed inscription thereon: "Customer Graver Tank Manufacturing Co." under the printed heading "Shipped to and Destination"; and

5. On February 20, 1962, after IMI's bankruptcy, Moore, as Secretary-Treasurer of Mosher, wrote to Fluor, advising Fluor that it furnished "Idaho-Maryland Industries Inc.", *not* the joint venture, "approximately $296,000.00 of fabricated steel and for fabricating steel furnished for Graver Tank." (Jt. Ex. 81)

C. *Jt. Exs. 9 and 10 Did Not Create an Agreement Between Mosher and IMI-Ward*

In Conclusion of Law #4, the District Court declared that, in performing its work for the Tucson and Vandenberg jobs, Mosher "did not deal with, nor rely upon the credit of, IMI individually, but Mosher performed pursuant to its agreement with IMI-Ward" (R 1238).

Thus, the District Court glided from the fact that Mosher did not rely upon the credit of IMI individually (as it did not rely upon the credit of Ward individually, or the credit of the joint venture of IMI-Ward) to the mystifying *non sequitur* that Mosher performed "pursuant to its agreement with IMI-Ward". Nowhere in its findings does the District Court advert to any testimonial or documentary support for its oracular pronouncement that an "agreement" arose between Mosher and IMI-Ward, a pronouncement which violates every principle in the Anglo-American law of contracts by which the formation or existence of a bilateral contract is determined. Every fact in this record, including the dispositive admissions of Mosher itself, establishes beyond the possibility of rational dispute that Mosher never accepted the credit of IMI, Ward or IMI-Ward either *in lieu of* or *in addition to* the credit of Union. Equally established by Mosher's own admissions

is the fact that Mosher never relied upon or looked to IMI, Ward or IMI-Ward for payment. The genesis of the alleged "agreement" between Mosher and IMI-Ward tangentially invoked by the District Court in CL 4 exists solely in the fiat of the Court itself.[12]

As will more fully appear in our discussion of the applicable law, the transfer of the customer's name upon Mosher's records for the convenience of IMI's bookkeeping was never the subject of any bargain by Mosher. Mosher's performance was never induced by that transfer. Its acquiescence in that respect was a mere accommodation which it was willing to effect if, and only if, Union reaffirmed its unconditional promise to pay. *Union's promise to pay was the sole inducement and consideration for Mosher's promise to perform.* To hold, as the District Court has held, that the transfer of the customer's name upon its books induced and was the consideration for Mosher's promise to perform is to disregard the record in this case in its entirety.

Specification of Errors

1. The District Court erred in refusing to find, in accordance with the evidence of Mosher's own witnesses and records, that there was never any agreement between Mosher and IMI, Ward or IMI-Ward; that Mosher had explicitly refused to accept the credit of IMI, Ward, or

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[12] In The Nature of the Judicial Process (Yale Univ. Press), pp. 106-107, Judge Cardozo wrote with his customary insight and felicity of phrase:

> "A judicial judgment, says Stammler, 'should be a judgment of objective right, and no subjective and free opinion; a verdict and not a mere personal fiat. Evil stands the case when it is to be said of a judicial decree as the saying goes in the play of the 'Two Gentlemen of Verona' (Act I, sc. ii):
>
> 'I have no other but a woman's reason;
> I think him so, because I think him so.'"

IMI-Ward; and that it had never looked to, or relied upon IMI, Ward or IMI-Ward for payment from the commencement of this work until its completion.

2. The District Court erred in refusing to find, in accordance with incontrovertible evidence, that a promise to perform, or the performance of an act which one is already legally bound to perform, cannot constitute a valid or sufficient consideration for the subsequent promise of another to pay.

3. The District Court erred in refusing to find that the extension of credit or delivery of goods to an individual member of a known partnership or joint venture does not create a partnership or joint venture obligation or debt.

ARGUMENT

POINT I

No contract of any kind was ever formed between Mosher and IMI-Ward. Mosher never bargained for, but on the contrary, explicitly refused to accept, the credit of IMI, Ward, or IMI-Ward and never looked to or relied upon IMI, Ward or IMI-Ward for payment.

No principle of Anglo-American contract law has been more firmly established than the doctrine that a bargain is an indispensable prerequisite to the existence or formation of a bilateral contract. Thus, a party can never recover upon the alleged promise of another if that promise did not induce his action and was not the subject matter of his bargain; if, in short, he did not act or rely upon the promise, or look to the promisor for payment.

A recent decision emphasizing these fundamental precepts was rendered by this Court in *Colorado National*

Bank of Denver v. *Boehm,* 286 F. (2d) 494 (1961). In that case, the Bank brought an action against Boehm to recover an amount allegedly due upon a promissory note. Boehm denied any liability upon the ground that he "received no consideration for executing the note." The note, in the sum of $25,000, had been made payable to one Mrs. Sears, and had been signed by Boehm and Mrs. Sear's son, Joseph. It appeared that an agreement had been reached between Mrs. Sears, her son Joseph and Boehm that Mrs. Sears would finance Joseph in the operation of a milling business, using Boehm's alfalfa mill as a base of operation. Mrs. Sears undertook to furnish Joseph with the sum of $40,000, $15,000 of which was paid to Boehm for a lease of the alfalfa mill to Joseph, with an option to purchase, and $25,000 of which was to be used by Joseph as operating capital. The sum of $25,000 was represented by the promissory note signed by Joseph and Boehm.

Boehm claimed that Mrs. Sears had told him that he would not be held liable upon the note and that he would never be called upon to pay it. The Bank contended that there was ample consideration for Boehm's execution of the promissory note in the form of both a detriment to the promisee and a benefit to the promisor; the detriment to the promisee being the sum of $25,000 paid by Mrs. Sears under the note and the benefit to Boehm being the $15,000 he received for the lease, and the fact that the remaining $25,000 was to be used in the operation of his mill, from which he would receive a rental.

In affirming a dismissal of the complaint and rejecting the Bank's argument that the alleged existence of a detriment to the promisee and a benefit to the promisor created a valid and subsisting contract obligation, this Court, per Orr, J., underscored the immutable principle in the law of contracts that the consideration must be "*bargained for*—

it must be the thing that the parties agree will be given in exchange for the promise."

This Court thereupon ruled in language directly applicable to the instant case:

> "Such evidence does not contradict or vary the terms of the note but impeaches the consideration necessary to make the note enforcible. Dixon v. Miller, supra. Appellant contends that this rule does not apply here because there was consideration for the note in the form of both detriment to the promisee and benefit to the promisor; the alleged detriment to Mrs. Sears was the $25,000 she paid out in connection with the note, and the benefit to appellee was the $15,000 he received for the lease and option under the other half of the transaction and the fact that the $25,000 was to be used to operate his mill, from which operation he was to receive rent. The error in appellant's argument in this respect is that it fails to recognize the fundamental common law principle that consideration must be *bargained for*—it must be the thing which the parties agree shall be given in exchange for the promise. (Citing, among other authorities, Fire Insurance Association, Limited v. Wickham, 1891, 141 U.S. 564, 579; 1 Williston Contracts §§ 100, 102, 102A [3rd ed. 1957]; Restatement, Contracts § 75 and comment b [1932]). The alleged benefits to appellee and detriment to Mrs. Sears could have been consideration for appellee's promise had they been bargained for and intended as such. *However, this was not the case, and therefore said benefits and detriment are not consideration.* 'The mere presence of some incident to a contract which might, under certain circumstances, be upheld as a consideration for a promise, does not necessarily make it the consideration for the promise in that contract.

To give it that effect, it must have been offered by one party, and accepted by the other, as one element of the contract.' (Citing cases). From appellee's conversation with Mrs. Sears it is clear that his signature of the note was given *solely* in exchange for her promise that he would not be held liable on the note; hence there was no consideration which could make this note enforcible against appellee." (Italics ours, except for the words "bargained for" underscored by the Court)

In its opinion, this Court cited the United States Supreme Court's decision in *Fire Insurance Association* v. *Wickham,* 141 U. S. 564 (1891), where the Court had formulated the applicable principles as follows (pp. 579 et seq.):

"That prepayment of part of a claim may be a good consideration for the release of the residue is not disputed; but it is subject to the qualification that nothing can be treated as a consideration that is not intended as such by the parties. Thus in Philpot v. Gruninger, 14 Wall. 570, 577, it is stated that *'nothing is consideration that is not regarded as such by both parties.'* To constitute a valid agreement there must be a meeting of minds upon every feature and element of such agreement, of which the consideration is one. The mere presence of some incident to a contract which might under certain circumstances be upheld as a consideration for a promise, does not necessarily make it the consideration for the promise in that contract. To give it that effect it must have been offered by one party and accepted by the other as one element of the contract. In Kilpatrick v. Muirhead, 16 Penn. St. 117, 126, it was said that 'consideration, like every other part of a contract, must be the result of agreement. The parties must understand and be influenced to the particular

action by something of value or convenience and inconvenience recognized by all of them as the moving cause. *That which is a mere fortuitous result flowing accidentally from an arrangement, but in no degree prompting the actors to it, is not to be esteemed a legal consideration.'* See also 1 Addison on Contracts, 15; Ellis v. Clark, 110 Mass. 389." * * * (Italics ours)

In *Wisconsin and Michigan Railway Co.* v. *Powers,* 191 U.S. 379, 386 (1903), Mr. Justice Holmes had summarized the applicable rules of law in the following classic language:

"In the case at bar, of course the building and operating of the railroad was a sufficient detriment or change of position to constitute a consideration if the other elements were present. *But the other elements are that the promise and the detriment are the conventional inducements each for the other.* No matter what the actual motive may have been, by the express or implied terms of the supposed contract, the promise and the consideration must purport to be the motive each for the other, in whole or at least in part. *It is not enough that the promise induces the detriment or that the detriment induces the promise if the other half is wanting.*" * * * (Italics ours)

The foregoing doctrines have been universally applied. In *Du Pont De Nemours & Co.* v. *Claiborne-Reno Co.,* 64 F. (2d) 224, 235 (1933), the Eighth Circuit, per Sanborn, Jr., quoted with approval the crystallization of those principles by the Restatement of the Law of Contracts as follows:

* * * " 'The fact that the promisee relies on the promise to his injury, or the promisor gains some advantage therefrom, does not establish consideration *without the*

> *element of bargain or agreed exchange.'* Restatement of the Law of Contracts of the American Law Institute, vol. 1, § 75, Comment c." (Italics ours)

In *Dougherty* v. *Salt,* 237 N.Y. 200, the issue before the New York Court of Appeals was whether there was any consideration for a $3000 promissory note delivered by an aunt to an 8 year old nephew upon a printed form which recited the words "value received." In reversing the judgment of the Court below, and dismissing the complaint, Judge Cardozo held (pp. 202-203):

> ". . . The aunt was not paying a debt. She was conferring a bounty (Fink v. Cox, 18 Johns 145). The promise was neither offered nor accepted with any other purpose. 'Nothing is consideration that is not regarded as such by both parties' (Philpot v. Gruninger, 14 Wall. 570, 577; Fire Ins. Assn. v. Wickham, 141 U. S. 564, 579; Wisconsin & M. Ry. Co. v. Powers, 191 U. S. 379, 386; DeCicco v. Schweizer, 221 N. Y. 431, 438). A note so given is not made for 'value received', however its maker may have labeled it. The formula of the printed blank becomes, in the light of the conceded facts, a mere erroneous conclusion, which cannot overcome the inconsistent conclusion of the law (Blanshan v. Russell, 32 App. Div. 103; affd., on opinion below, 161 N. Y. 629; Kramer v. Kramer, 181 N. Y. 477; Bruyn v. Russell, 52 Hun. 17). *The plaintiff, through his own witness, has explained the genesis of the promise, and consideration has been disproved."* (Italics ours)

Subsequently, in *McGovern* v. *City of New York,* 234 N.Y. 377, 388-389, the foregoing rules of law were reiterated and reaffirmed by Judge Cardozo in the following language:

". . . 'Nothing is consideration', it has been held, 'that is not regarded as such by both parties' (Philpot v. Gruninger, 14 Wall. 570, 577; Fire Ins. Assn. v. Wickham, 141 U. S. 564, 579; DeCicco v. Schweizer, supra, at p. 438). The fortuitous presence in a transaction of some possibility of detriment, latent but unthought of, is not enough (Fire Ins. Assn. v. Wickham, supra). *Promisor and promisee must have dealt with it as the inducement to the promise* (Holmes Common Law, p. 292; Wisconsin & Mich. Ry. Co. v. Powers, 191 U. S. 379, 386; 1 Williston, Contracts, § 139, p. 309). The proposition to modify the contract was not presented by the plaintiffs, nor accepted by the city, as one for the surrender of a veritable opportunity to find cheaper labor elsewhere. It was presented and accepted on the theory that the opportunity did not exist either in expectation or in reality . . ." (Italics ours)

It is utterly beyond dispute that the only consideration for which Mosher had bargained was the unconditional obligation and commitment of Union; that Mosher's promise to perform was induced solely and only by the reciprocal promise of Union to pay; that Mosher neither sought, bargained for, nor would accept the credit of IMI, Ward or IMI-Ward; and that its acquiescence in the requested change in the name of its customer upon its books was totally and continuously rejected, even as a mere accommodation, until Union's specific reaffirmation on November 15, 1961 of its promise to pay Mosher direct. An appropriate summary of the determinative principles of law was voiced by the Supreme Judicial Court of Massachusetts in *La Chance* v. *Rigoli,* 325 Mass. 425, 91 N.E. (2d) 204 (1950) in language directly applicable herein:

"The contracting party must look for payment to the one to whom credit was extended when the work was done, that is, the one who was expected to pay * * *"

In view of the incontestable facts established by the record in this case, the rules of law set forth in the decisions hereinabove cited and quoted completely negate the existence of any legally cognizable obligation on the part of Ward to Mosher under Jt. Exs. 9 and 10.

POINT II

A promise to perform, or the performance of an act, which one is already legally bound to perform cannot constitute a valid or sufficient consideration for the subsequent promise of another to pay.

In number 1 of its proposed Conclusions of Law, Mosher claims the existence of a binding "*oral contract* made on October 13, 1961 between Union and the Plaintiff" (R 1406). In number 2 of its proposed Conclusions of Law, it claims that the letter agreement of October 16, 1961 constituted a valid "*interim purchase order*" between the plaintiff and Union (R 1406). In number 4 of its Proposed Conclusions of Law, it claims the existence "of an *oral contract* made on November 15, 1961" by which Union agreed to pay all sums to become due to Mosher for the materials and labor which it furnished for the Tucson and Vandenberg jobs (R 1407).

By its own admissions, Mosher has insisted, again and again, that it became unconditionally obligated, *on three different occasions,* under its contract with Union, to perform the work and furnish the materials for the Tucson and Vandenberg projects and that it became so legally obligated "*prior to, and as a condition of*", its alleged acceptance of Jt. Exs. 9 and 10 (R 1406). In short, it is here contending that the consideration which it purportedly furnished for those documents was precisely what it was already legally bound and obligated to furnish under the

three contracts with Union which it had *previously* consummated.

It is textbook learning that a promise to perform, or the performance of an act, *which one is already legally bound to perform cannot possibly constitute a valid or sufficient consideration for the subsequent promise of another to pay.* The authorities are legion and incontestable.

In *Teele et al* v. *Mayer,* 173 A. D. 869, the plaintiffs, an accounting firm, entered into a contract evidenced by two letters to render accounting services in the examination of the books of two railway companies operating in western New York. Thereafter, the plaintiffs claimed that the defendant, the President of the two railroads, orally promised to pay them for their work. The plaintiffs then sued the defendant upon his individual promise allegedly made after they had entered into the contract with the railway companies for the performance of their services. In reversing a judgment rendered by the Court below in favor of the plaintiff, and dismissing the complaint, the Appellate Division of the New York Supreme Court ruled as follows (pp. 871-872):

> "The only consideration that is urged as sufficient to sustain his personal undertaking to pay for plaintiffs' services is the suggestion that plaintiffs went on and completed the work in reliance upon his promise, whereas, but for that, they would have discontinued their work. This suggestion loses sight of the fact that, when the alleged promise was made, *the plaintiffs had already undertaken by contract with the railway companies to do this very work, and that they did nothing and no more after defendant's promise than they had already agreed to do.* * * * *Here was a complete and binding contract between plaintiffs and the railway companies which plaintiffs were bound to per-*

> *form, so that it is entirely accurate to say, that plaintiffs did no more in reliance upon defendant's promise than they were already bound to do by their contract with the railway companies.* * * * If then plaintiffs agreed to do no more, and in fact did no more than their contract with the railway companies obligated them to do, their continuance and completion of the work afforded no consideration for defendant's alleged promise. Nothing is better settled than that the doing of an act which a party is under a legal obligation to perform cannot constitute a consideration for a new contract." (Italics ours)

The rules of law set forth by the Appellate Division in the foregoing case have been repeatedly reiterated and applied by the New York Courts. In *Arend* v. *Smith,* 151 N. Y. 502, the New York Court of Appeals declared at page 505:

> "No consideration can arise simply from the method of doing an act which it is one's duty to do. The subject does not admit of extended discussion, for it has been a principle of the common law from the earliest times that a promise without a legal consideration as an equivalent cannot be enforced, and it is well settled that 'the performance of an act which the party is under a legal obligation to perform cannot constitute a consideration for a new contract'. (Robinson v. Jewett, 116 N. Y. 40.)".

The principles set forth in the foregoing decisions have been universally applied. In *Halstead Lumber Co.* v. *Hartford Accident & Indemnity Co.,* 38 Ariz. 228, 298 Pac. 925, the Supreme Court of Arizona held:

> "A promise to do something which a party is already legally obliged to do is no consideration for a contract."

In *Konigsberger* v. *Wingate,* 31 Tex. 42, 98 Am. Dec. 512, the Texas Court ruled as follows at page 513:

> "The testimony as given, if added to the note, as we are bound to consider it, would make the note read, Payable as soon as I have complied with the contract that I have made and am legally bound to perform, it being understood that the only consideration of this note is to cause me to do what I am already bound to do.
>
> We consider it unnecessary to dwell on the subject. It is perfectly obvious that there was no legal consideration for the note."

In *Marinovich* v. *Kilburn,* 153 Cal. 638, 96 Pac. 303, the California Court held as follows at page 304:

> "The principal contention of the plaintiff, upon this appeal, is that the fact that the plaintiff was unwilling to perform his contract to pay to the company the balance of his subscription, and was refusing to do so, and the fact that he agreed to, and did, perform it because of the agreement sued on, constituted a sufficient consideration for the agreement on the part of Kilburn to buy the stock and pay him $3,000.00 therefor. We think this proposition is not tenable. This court has said: 'It is well settled that neither a promise to perform a duty, nor the performance of a duty, constitutes a consideration of a contract.' Sullivan v. Sullivan, 99 Cal. 193, 33 Pac. 862. In Ellison v. Jackson Water Company et al., 12 Cal. 553, Ellison was bound by contract to do certain work for the Jackson Water Company. Thereafter one Bayerque, a defendant in the action, promised that, if Ellison would proceed with the work he (Bayerque) would pay to Ellison the amount due under the contract. The court says: "A

promise to *Bayerque* to perform this contract could furnish no consideration for a promise *by him.* The consideration of the original contract could not attach to the subsequent promise.' (The emphasis is ours.)"

In *Mason Construction Co., et al.* v. *Kosmos Portland Cement Co.,* 248 Ky. 782, 59 S.W. (2d) 1016, the Kentucky Court of Appeals formulated the applicable doctrines as follows:

"There was no consideration for this bond as between the Mason Construction Company and the Kosmos Portland Cement Company. *The material had not been furnished or the credit extended to Bell on the faith of this instrument.* Standard Oil Co. v. National Surety Co., 234 Ky. 764, 29 S. W. (2d) 29.

* * * It is a settled principle of law that a promise to do what the promisor is already bound to do cannot be a consideration for a contract. Wallace v. Cook, 190 Ky. 262, 227 S. W. 279. Where one owes a duty to another, a bond executed for the purpose of inducing him to perform that duty is without consideration—a requisite element of every contract." (Italics ours)

In *Watson* v. *American Creosote Works,* 184 Okla. 13, 84 Pac. (2d) 431, the Supreme Court of Oklahoma applied the rules as follows in language directly applicable to the instant case:

"The defendant contends that he made an oral contract with the plaintiff under which the plaintiff agreed with the defendant that plaintiff would deliver on or before June 5, 1929, the bridge building material included in the contract between the plaintiff and Wise County, Texas. In other words, the defendant contends that the plaintiff promised to carry out the terms

of a contract made between the plaintiff and Wise County, Texas. This is an alleged breach of an oral contract between the defendant and the plaintiff. That is to say, the plaintiff promised to carry out the terms of a contract with other parties, while the defendant did not promise to do anything. Whatever obligation to the defendant that might have existed on the part of plaintiff to carry out the oral agreement, relative to the delivery of the bridge material, there still was neither mutuality of obligation nor consideration to support such a contract. The obligation to deliver the bridge material at a specified time was an obligation that existed under the contract between the plaintiff and the purchaser, Wise County, Texas."

It is impossible to conceive of a more positive affirmation of a fact than Mosher's testimony that it obtained, upon its unyielding insistence, on three different occasions, an absolute and unconditional obligation from Union to pay, in consideration of its own absolute and unconditional obligation to perform the work and deliver the materials for Tucson and Vandenberg, "prior to, and as a condition of," its change of the customer's name from Graver to IMI upon its records.

It is equally impossible to conceive of a case to which the rules of law set forth above more directly and unqualifiedly apply than the instant one, necessitating without more, a dismissal of Mosher's causes of action against Ward from whom a recovery is sought solely upon the theory that Jt. Exs. 9 and 10 are binding contracts supported by a valid consideration.

POINT III

The extension of credit or the delivery of goods to an individual member of a known partnership or joint venture does not create a partnership or joint venture obligation or debt.

As appears from paragraph 20 of the joint venture agreement between IMI and Ward, "this agreement and the performance thereof and any matters arising out of, under or in connection therewith shall be construed and determined in accordance with the laws of the State of New York." (Jt. Exh. 8)

The foregoing provisions are binding and enforceable, and the law of New York must be applied to the plaintiff's claims against Ward herein. Under New York law, the liability of a joint venturer to a third party is *not* equivalent to the third party liability of a partner. (*Wrenn* v. *Moskin,* 226 App. Div. 563, 235 N. Y. Supp. 405) In the absence of an agreement, express or implied, there is no authority for one joint venturer to act as the agent of another. (*Wrenn* v. *Moskin,* supra) A third party will be bound by any provision in the joint venture agreement restricting the authority of one to bind the other. (*Etzkorn* v. *Levy,* 159 N. Y. Supp. 801)

Under paragraph 2 of the joint venture agreement, it is expressly provided that the "IMI-Ward subcontracts will be entered into in the names of the parties hereto as joint venturers . . . ." Under paragraph 7, it is provided that "the work shall primarily be performed by IMI in facilities owned or operated by it." Under paragraph 8, it is agreed that *"The work to be performed by IMI shall be financed solely and completely by IMI* and such work as may be assigned by the Committee to Ward, if any,

shall be solely and completely financed by Ward." Under paragraph 9, it is agreed that "Neither the Committee nor either party hereto shall have the power to borrow moneys *or pledge the credit of the other party to this agreement or on their joint credit,* except as herein provided."

The applicability of New York law to the case at bar, and the enforceability under New York law of restrictions upon the authority of one joint venturer to bind another to third parties, was confirmed by the Supreme Court of Michigan in *American Mut. L. Ins. Co.* v. *Hanna, Zabriskie & Daron,* 297 Mich. 599, 298 N. W. 296, where the court ruled at pp. 299-300 as follows:

> "The first question raised by the appellant is whether the law of New York or the law of Michigan should be applied. The result would undoubtedly be the same in either jurisdiction, but since the agreement limiting the liability was made in New York and was to have effect there, *it is our view that the law of New York must govern.* The trial court entertained similar views.
>
> In many ways a joint venture is similar to a partnership. However, it must be remembered that they are separate and distinct legal relationships. The law does not attach the same legal consequences to them. Because there is a joint venture, it does not necessarily follow that there is a mutual agency even as to third parties. It was held in Wrenn v. Moskin, 226 App. Div. 563, 235 N.Y.S. 405, that there is no authority for one joint adventurer to act as the agent of the other in the absence of an agreement, express or implied.
>
> In the instant case, there was an express agreement made in the State of New York restricting authority

> and liability, hence the Hanna Company cannot be said to have given its implied consent and there was no claim that there was any express authority. This case is very similar to that of Etzkorn v. Levy, Sup., 159 N.Y.S. 801, where it was held that a third party was bound by an agreement between two joint venturers restricting the authority of either to bind the other within the scope of the business, the relationship being unknown, when the third party executed the contract. *From a reading of the New York cases, it becomes clear that the restrictive agreement is valid* * * *" (Italics ours).

Even if we assume, *arguendo,* that the liability of joint venturers to third parties under New York law is precisely the same as the liability of partners, the plaintiff could not possibly sustain any claim herein against Ward. From the inception of this lawsuit, Mosher has proceeded upon the supposition that, where a partnership is known, the extension of credit or delivery of goods to an individual partner in his individual name automatically creates a partnership obligation or debt. That hypothesis is completely erroneous and fallacious. The law is directly to the contrary.

The authorities have unanimously and universally ruled that, under such circumstances, the partnership is not liable for the indebtedness of an individual partner, even though the partnership may have received the benefit of the credit or delivery of goods. The classic authority in the United States is the decision of the New York Court of Appeals in the famous and oft-cited case of *National Bank of Salem* v. *Thomas,* 47 N.Y. 15, where the court formulated and applied the applicable rules of law as follows at pp. 19 et seq.:

"This is not an attempt to charge a dormant partner. It is probably true that a dormant partner may be charged upon an express contract made by the active and known partners in the name in which the co-partnership business is ordinarily done, as well as upon the implied contracts of the firm. In either case the contract is in the name by which the dormant partner is represented, and in which he has authorized business to be transacted for his benefit. A dormant partner is one who takes no part in the business, and whose connection with the business is unknown. Both secrecy and inactivity are implied by the word. (Parsons on Part., 33, per Baldwin, J.; Winship v. Bank of U.S., 5 Pet. 573; North v. Bloss, 30 N.Y. 374.) The defendant was neither inactive nor was his connection with the business a secret. *The partnership so far as appears, was open and public.* But the difficulty with the plaintiff's case is, that the contract was not that of the firm, but of individual members of the firm. *The money was loaned by the plaintiff on the individual credit of Hoag and Batty, and the fact that it was applied to the payment of partnership debts, does not constitute the lender a creditor of the firm"* (Italics ours).

The rules of law formulated by the court in the *Salem* case supra, are universally applied. In 40 Am. Jur. §160, p. 243, they are set forth as follows:

"A partner is liable alone on all contracts made by him on his own exclusive credit. If money is borrowed or goods are bought or any other contract is made by one partner upon his own exclusive credit, he alone is liable therefor, and the partnership, although the money, property, or other contract is for its proper

use and benefit or is applied thereto, will in no manner be liable therefor."

The decisions in the State of Texas, Mosher's home State, are in complete accord with the foregoing principles. In *First State Bank of Riesel* v. *Dyer,* 151 Tex. 650, 254 S. W. (2nd) 92, the plaintiff bank brought an action against Dyer and Woodside to recover upon a note signed by Woodside and his wife, but not purporting to be the obligation of Waco Gibson Tractor Sales, a partnership consisting of Dyer and Woodside. The trial court dismissed the action against Dyer. Upon appeal, the Supreme Court of Texas affirmed the dismissal. After quoting from the sections of Amer. Jur. cited above, the court declared (pp. 653-654):

"There is no evidence to show liability of Dyer to the Bank. The Bank knew that Dyer was a partner in Waco Gibson Tractor Sales—according to the most favorable testimony to the Bank—but knowing this fact, made the loans to Clinton Woodside and Edna Woodside, and never asked or demanded that the firm name be signed, or that Dyer sign any of the notes given for the loans involved in this suit. *The Bank's liability ledger sheet showed liability was carried only in the name of Clinton Woodside.*" (Italics ours.)

Recently, in *Pair* v. *Caraway Drilling Co.,* 250 S.W. (2nd) 292, the Texas Court of Civil Appeals ruled as follows (p. 295):

"We further conclude that the record conclusively shows that Caraway, in drilling the hole and setting the oil string, *contracted solely with Schkade and extended credit to him alone.* For this reason, if no other existed, the judgment against Pair for $3,892.85, for

drilling the hole at $2.65 per foot, cannot be sustained." (Italics ours)

The law of California is precisely the same. In *Bratton & Moretti* v. *Finerman & Son,* 171 Cal. App. (2nd) 430, 340 Pac. (2nd) 673, the California Court of Appeal ruled as follows (p. 675):

"The trial court was justified in finding that the fertilizer delivered by the plaintiffs was sold and delivered upon the individual credit of the defendant Finerman and not on the credit of a partnership or joint venture. Shapiro v. Greenberg, 94 Cal. App. 241, 270 p. 1008. Even a joint venturer or partner may contract on his own account and may make himself individually liable if the seller chooses to accept such individual liability and in reliance thereon delivers goods."

The foregoing rules of law have been enunciated and applied by the courts of every other jurisdiction to which the issue has been presented. In *Alaska Pacific Salmon Co.* v. *Matthewson* et al., 3 Wash. (2nd) 560, 101 Pac. (2nd) 606, a joint venture existed between Matthewson, doing business under the name of the Matthewson Shipping Company, and two individuals, Tebb and Anderson. Matthewson contracted to purchase certain stock in a corporation from the plaintiff. Subsequently, he defaulted in payment of the balance due for the purchase price of the stock. The plaintiff brought an action against Matthewson, Tebb and Anderson, contending that the three persons named were partners in the purchase of the stock. The court ruled that, "without so deciding, it will be assumed, only for the purpose of this decision, that they were partners, and that they would be liable as such."

In dismissing the plaintiff's complaint against Anderson (Tebb having defaulted in appearing), the court ruled that

the other members of the joint venture could not be held liable for the purchase of the stock under the contract signed by the Matthewson Shipping Company alone, the plaintiff having known at that time that Tebb and Anderson were joint venturers with Matthewson. The Supreme Court of the State of Washington held as follows, at page 607:

> "As already stated, the contract for the purchase was signed only by Matthewson Shipping Company. At that time, the Court found, and the evidence shows, the salmon company knew that Tebb and Anderson were financially interested with Matthewson in the purchase of the stock. It is a well known rule that, where a partnership business exists, each partner is a principal, as well as an agent. In other words, each partner is an agent of the other partners in the transaction of the partnership business. 47 C.J., p. 643; 1 Rowley, Modern Law of Partnership, 485, §411. *Where, however, the partners are disclosed and known to a party contracting, and the contract is only signed by one of the partners who contracts on his own behalf, the other partners are not bound thereby.* From what has been said it follows that neither Tebb nor Anderson was obligated under the contract of purchase." (Italics ours)

In *Queen City Petroleum Products Co.* v. *Norwood-Hyde Bank and Trust Company,* 49 Ohio App. 397, 197 N.E. 357, one Donnelly borrowed certain moneys from the plaintiff bank, advising the bank that he was a member of a firm which had a contract to do certain work which would net the firm a large sum of money. Donnelly further stated that the money loaned would be used by the partnership for the prosecution of the work, and the money so borrowed was in fact so used. When Donnelly defaulted in the pay-

ment of the loan, the bank attempted to recover the balance due from the partnership. In dismissing the claim, the Ohio Court of Appeals ruled as follows at page 358 et seq.:

> "That the funds borrowed by the individual partner were used for, and in the business of, the partnership, is not in itself sufficient to prove a partnership obligation. Peterson v. Roach, 32 Ohio St. 374, 30 Am. Rep. 607, the second paragraph of the syllabus reads: 'Where a partner borrows money on the credit of his individual note, which is signed also by a surety, such borrowing does not create a partnership debt, though the money be applied to partnership purposes; and the principal of such surety is the individual partner, with whom he joins in the execution of the note, and not the partners generally.'"

In *Southern Surety Co.* v. *Plott,* 28 Fed. (2nd) 698, the Circuit Court of Appeals, Fourth Circuit, held as follows at page 700:

> "Where one, with knowledge of a partnership, elects to contract with an individual member of the partnership upon that member's exclusive credit, even though the contract is for the benefit of the partnership, the member contracted with and he alone is liable under the contract."

Under the authorities cited and quoted above, it is indisputably clear that, *if* the plaintiff had extended any credit whatsoever to IMI, any liability resulting therefrom was solely an individual indebtedness of IMI, and not an obligation of Ward or the joint venture. The following summary of the documentary evidence in this regard is conclusive:

(1) The so-called purchase orders of November 3, 1961 were issued by IMI alone, upon the purchase order forms of IMI, and were all signed by Frank J. Wright as Buyer for IMI;

(2) The name of the customer upon Mosher's shop orders was changed by Mosher itself from Graver to IMI;

(3) The name of the customer upon Mosher's weekly production records was changed by Mosher itself from Graver to IMI;

(4) Mosher's accounts receivable ledgers for both the Tucson and Vandenberg jobs (Jt. Exs. 17 and 18) show IMI as Mosher's sole debtor;

(5) Every invoice issued by Mosher for the Tucson and Vandenberg projects (Jt. Ex. 14) show IMI as Mosher's sole debtor;

(6) Both the Tucson and Vandenberg projects were invoiced by Mosher solely and only to IMI;

(7) On February 20, 1962, after IMI's bankruptcy, the plaintiff wrote to Fluor, advising Fluor that it was asserting a claim against IMI for the work which it had performed on the Tucson job (Jt. Ex. 81); and

(8) In the IMI bankruptcy, the plaintiff filed a proof of claim against IMI individually as an individual creditor of IMI and procured a final judgment against IMI individually, upon the claim that the purchase order forms of November 3, 1961 created an individual obligation of IMI entitling the plaintiff to share in the individual assets of IMI equally with all other individual creditors of IMI. The plaintiff has received, in full, the benefits provided by that judgment (R 663-668).

In *Eads Hide & Wool Company* v. *Merrill,* 252 Fed. (2d) 80, the Tenth Circuit held that a creditor who had filed

his claim in the individual bankruptcy of Chapman as an individual creditor of the bankrupt and shared *pro rata* in the individual bankrupt's assets, was judicially estopped from later asserting that the obligation was, in fact, a partnership obligation for which Merrill, the alleged non-bankrupt partner, could be held responsible in an independent action subsequently instituted against him. In its comprehensive opinion, the Tenth Circuit declared:

> "Appellant has formerly asserted a right to share in the individual estate of a bankrupt partner on an equal basis with other individual creditors. He has acquiesced in the amounts settled between Merrill and the trustee in bankruptcy as conveyances made in preference to Merrill as a creditor of Chapman. * * * Having thus recognized Merrill as a creditor of the Chapman estate and having thus declared itself to be a creditor of Chapman individually through its acceptance of dividends to the detriment of other general creditors, it must be held to be estopped to now claim that the obligation due it was a partnership obligation."

Under the foregoing authorities, it is indisputably clear that the final judgment procured by Mosher against IMI in the IMI bankruptcy proceeding constituted an irrevocable determination that Jt. Exs. 9 and 10, *if they created any obligation at all,* created only an individual obligation of IMI, and not an obligation of the joint venture.

The plaintiff has shared in the individual assets of IMI, as an individual creditor of IMI, pro rata with all other individual creditors of IMI, upon an obligation allegedly created by Jt. Exs. 9 and 10 which it then claimed to be the separate, individual and independent obligation of IMI. It cannot now, in this action, escape the consequences of the position which it then took, and the judgment which

it obtained in the IMI bankruptcy proceedings, by advancing the completely contrary argument that those documents did not create an individual obligation of IMI, but rather a joint venture obligation, and that IMI was, in any event, liable for that indebtedness as a member of the joint venture. The liability imposed upon IMI as a joint venturer, under partnership law, could not possibly have justified the individual recovery obtained by the plaintiff as an individual creditor of IMI in IMI's individual bankruptcy proceeding. (*Schall* v. *Camors,* 251 U.S. 239, 255, aff'g 250 Fed. 6; *In re Hacker & Co.,* 225 Fed. 869; *Cutler Hardware Co.* v. *Hacker,* 8th Circ., 238 Fed. 146).

By procuring a final judgment in the bankruptcy proceeding and availing itself in full of the benefits provided therein, the plaintiff irrevocably elected to treat the indebtedness for its deliveries to the Tucson and Vandenberg jobs as a separate and independent indebtedness of IMI, and not as an indebtedness of the joint venture. Its present position constitutes a fraud upon all of the individual creditors of IMI whose claims against IMI individually were diminished by the distribution made to the plaintiff as an individual creditor of IMI. (*In re Hurley Mercantile Co.,* 9th Circ., 56 Fed. (2d) 1023).

CONCLUSION

The juridically dispositive facts established by the record upon this appeal are indisputable. The rules of law applicable thereto constitute the very foundation of contract law upon which our existing structure of commerce and trade has been reared. Those rules of law are expressed, in capsule form, in the following excerpts from leading decisions across the land:

"The foregoing evidence to my mind establishes conclusively that plaintiff carried these shipments *on the sole and exclusive credit* of Freight Cargo and *never expected or intended to collect* from Bank Note" (*Flying Tiger Line Inc.* v. *American Bank Note Co.,* 198 Misc. 483, 487, 96 N. Y. Supp. (2d) 618, 620-622). "The evidence as to Hayes Manufacturing Co. indicates that all negotiations for the sale of the involved chairs were transacted with the agent of Great Western Hotels Inc. *and that Hayes looked to it alone for payment*" (*Borgonovo* v. *Henderson,* 182 Cal. App. [2nd] 220). "The evidence, however, conclusively shows *the credit was extended to Krueger, and him only,* upon his own solicitation and representations" (*Young's Market Co.* v. *Laue,* 60 Ariz. 512, 141 Pac. [2nd] 522, 523).

For all of the reasons hereinbefore set forth, it is respectfully submitted that the judgment entered by the District Court in favor of Mosher against Ward be reversed

and Mosher's cause of action against Ward dismissed upon the merits.

Respectfully submitted,

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Certificate of Compliance

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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